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No. 97- **97 • 503** SEP 17 1997

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IN THE

Supreme Court of the United States

October Term, 1996

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

Petitioners,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS & DOES 1-25,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. MICHAEL GERMAN, ESQ.
Counsel of Record
22 Second Street - Suite 310
San Francisco, CA 94105-3406
(415) 536-1838

Attorney for Petitioners

86 pp

QUESTIONS PRESENTED

Whether the action of a county central committee, in twice removing two gay men twice elected to it, was state action for purposes of pleading 42 USC §§1983, 1985(3) and 1986 civil rights claims on behalf of the two committeemen ousted and the 1,500 voters who elected them, and for the purposes of protecting their fundamental voting and political rights under the I and XIV Amendments.

Whether homosexuals constitute a suspect class for purposes of pleading 42 USC §§1985(3) and 1986 claims.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Paul Johnson, Kevin Wadsworth, Lauren Cooper, Ray Sebastian and Barbara Sebastian, individually and on behalf of all others similarly situated, request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997), attached at Appendix (AX) A.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on May 21, 1997. On July 2, 1997, a *sua sponte* Order from the Ninth Circuit directed the parties to brief "the question of whether this case should be reheard en banc," which briefing was completed on July 28, 1997. AX B. Petitioners sought, and on August 8, 1997 were granted, an extension of time until September 18, 1997 to Petition for a Writ of Certiorari, pursuant to Supreme Court Rule 13.5. On September 10, 1997, the Ninth Circuit issued its Order denying rehearing and rejecting the suggestion for rehearing en banc. AX C.

This Court's jurisdiction in invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

42 USC §§1983, 1985(3) and 1986, as stated in AX D.

STATEMENT OF THE CASE

The fundamental question in this case is whether the action of a county central committee, in twice removing two gay men twice elected to it, was state action for purposes of pleading 42 USC §§ 1983, 1985 and 1986 civil rights claims. Inherent in that question is whether homosexuals are a suspect class for purposes of §§1985 and 1986. To appreciate the national importance of the issues in this case, and to recognize why granting this Petition is necessary to protect the fundamental voting rights of not just homosexual, but all, Americans, its history must be considered.

Petitioners Paul Johnson and Kevin Wadsworth, a gay couple who are longtime registered Republicans, and their named co-Petitioners, individually and on behalf of the class they hope to represent, filed this action to be reinstated to the Republican Central Committee of El Dorado County in U.S. District Court for the Eastern District of California. Jurisdiction was based upon the provisions of 28 USC §§ 1331, 1343, 1357, 1367 and 2201. They also sought damages from former California Assemblyman David Knowles and from those Committee members who voted to remove them, and declaratory relief invalidating the Committee's bylaws under which they were removed.

Johnson and Wadsworth, after a decade of activity in Republican politics, including membership on central committees in other California counties, were first elected to El Dorado County's Committee in the 1992 California primary and reelected to it in the 1994 primary for successive two-year terms commencing each January after their election. They won election in 1994 "despite the best efforts of certain of their colleagues on the Central Committee and other California Republicans, including but not limited to

Defendants KNOWLES and CARLSON, who vowed 'We've got to get rid of those faggots,' and actively worked to do so." First Amended Complaint (FAC), AX E, at ¶7.

Johnson and Wadsworth lived together in El Dorado County at "The Lone Antler Ranch," which they occasionally leased for receptions, fundraising and other uses. Proceeds from Ranch rentals were used to defray the cost of medical treatment for Wadsworth, who is a disabled Vietnam-era Marine Corps veteran suffering from AIDS. AX E, at ¶8. Johnson leased the Ranch to the Katie Hirning For Congress Campaign for a September 17, 1994, fundraiser for Ms. Hirning, the Democratic candidate for the November, 1994 Congressional election, in which she opposed incumbent Republican Congressman John Doolittle. Per the Committee's bylaws, the lease specifically provided that neither Johnson's nor Wadsworth's name would be used in connection with the fundraiser, which was held as scheduled. Neither Johnson nor Wadsworth took part in it except as lessors, AX E, at ¶9, a practice also engaged in by Respondent Tom Schumacher with respect to leasing his own property to Democrats for fundraisers, but without the same consequences that Petitioners suffered. AX E, at ¶16.

On September 5, 1994, a week before the Committee's regularly scheduled meeting, Johnson learned that his father had died in Ohio that day. Both Petitioners immediately made plans to attend the funeral and advised Respondents Schumacher and Laveta Stelzmiller, Assemblyman Knowles' appointee to the Committee, that it was possible neither would be able to attend the September 12 meeting. Wadsworth did not travel to Ohio due to his need to receive AIDS treatment on the morning of September 12, but he did go to the Committee meeting that evening. The meeting was called to order by Respondent David Titus and pro-

ceeded with its business, including electing Respondent Robert Becker, Assemblyman Knowles' former legislative aide, to the Committee, until Wadsworth began to feel ill and left. Prior to his departure, neither the notice of, agenda for nor any discussion at the meeting gave Wadsworth any sign that any action was to be taken against him. AX E, at ¶¶3 and 11.

Under Titus' direction, the Committee then went into "Executive Session," despite no provision for doing so in its bylaws or in the California Elections Code (CEC). Respondent Tom Emigh initiated discussion of Petitioners' role in the Hirning fundraiser held at the Ranch and moved that each be removed from the Committee for allegedly failing to support Republican candidates and for providing support to Democratic candidates. After discussion supporting the motion from Respondents Bernard Carlson and Becker, the motion passed 13 to 1 with 3 abstentions. Petitioners pled on information and belief that Knowles instructed, prevailed upon or otherwise influenced Becker and Laveta Stelzmiller to vote for Petitioners' ouster. AX E, at ¶12.

Between December 31, 1994, and January 3, 1995, Laveta Stelzmiller mailed Committee members notice of its January 9, 1995, organizational meeting, but no agenda was enclosed. At that meeting, Wadsworth was sworn into his re-elected Committee office and Titus, Schumacher, Becker and Maloa Gribkoff were elected Chairman, Vice-Chairman, Secretary and Treasurer, respectively. An organizational agenda given to those present at the meeting listed "Adoption of By-laws" as item III, but a copy of the proposed bylaws was not included with the notice. Wadsworth objected to consideration of these proposed bylaws as out-of-order due to inadequate notice, but Titus overruled his objection and the bylaws were adopted. AX E, at ¶14.

Emigh then stated his intention to seek Wadsworth's removal at the Committee's next meeting, set for February 13, 1995, under new bylaw Article XIX "for engaging in actions injurious to the Committee." Petitioners pled on information and belief that Titus had directed Becker to draft these new bylaws prior to the January 9, 1995, meeting and that other Respondents, including Emigh and Knowles, knew that they would be drafted and presented for adoption on that date. AX E, at ¶15.

On February 6, 1995, Becker mailed a notice of the February 13, 1995, meeting to all members of the Committee, accompanied by an agenda which listed as item IXA "Disciplinary Action." At the meeting, Emigh moved, and Carlson seconded, Wadsworth's removal "for engaging in actions deemed injurious to" the Committee. After discussion of the motion from, among others, Becker, Carlson, Emigh and Schumacher addressing alleged statements made and actions taken by Wadsworth before January 9, 1995; alleged criticism of the Committee made by Wadsworth, overheard by Respondent Susan Emigh, Tom's wife, and recorded in her "sworn testimony" not produced at the meeting; a December 15, 1994, letter allegedly sent by Hirning to her "supporters," which was never shown to Wadsworth; concern that the Committee beware of expelling members who rent property to Democrats, in light of Schumacher's regularly renting property jointly owned by him to Democrats; and Knowles' admission to Schumacher that his reason for pushing, directly or indirectly through his aide Becker and other members of the Committee, Wadsworth's removal was due to his "being homosexual," the motion was passed 9 to 3 with 1 abstention. AX E, at ¶16.

Petitioners' class action complaint was filed on May 8, 1995, and alleged Respondents acted under color of state

law, including the CEC and the Committee's 1995 bylaws, in violating Petitioners' rights under 42 USC §§1983, 1985 and 1986. AX E, at ¶28. Petitioners' remaining claims pled state constitutional, statutory and common law tort theories of relief, along with a federal declaratory relief claim under 28 USC §2201 against those bylaws. AX E, at ¶¶29-54. They prayed for jury trial; special, general and punitive damages; costs, interest, and attorneys fees; and for injunctive relief by reinstating Wadsworth.

Although certification was not determined prior to dismissal, certain of the class action allegations are relevant to this Petition. Johnson and Wadsworth sued on behalf of themselves and those registered Republicans in their electoral district who voted for them in the June, 1992 and 1994 primaries and "whose votes were thereafter twice nullified" by Respondents' acts. As based upon those elections' returns, the potential class has a membership of 1,500-2,500 persons and its members share common damages by suffering "prejudice to and dilution and deprivation of their rights as voters affected by Defendants'" twin ousters of Johnson and Wadsworth. AX E, at ¶¶21-23 and AX A-3.

Respondents challenged Petitioners' complaint with a FRCvP 12b6 motion to dismiss for failure to state a claim, which was granted. Petitioners' 42 USC §§1985(3) and 1986 claims were dismissed without leave to amend, but their 42 USC §1983 and 28 USC §2201 declaratory relief claims were dismissed with leave to amend. Joined by fellow Republicans Ted and Lauren Cooper and Ray and Barbara Sebastian, Petitioners timely filed their FAC, to which Susan Emigh was added as a Defendant. Respondents again moved to dismiss under FRCvP 12b6 and their motion was granted in full and without leave to amend, the district court noting that Petitioners' theory of the case

"simply stretches the public function test too far."

Judgment issued upon the order of dismissal and an appeal of right was timely filed in the Ninth Circuit Court of Appeals on April 18, 1996. Pursuant to 28 USC §1367d, Petitioners filed a verified class action complaint on March 18, 1996, in the El Dorado County Superior Court similar to their district court suit but purged of its federal claims. Anticipating recusals among the El Dorado County bench, Petitioners moved to transfer venue elsewhere. At the same time, Respondents moved to stay that action pending resolution of the federal appeal, pursuant to Cal. Code of Civ. Procedure §§410.30a and 418.10a2. Respondents' motion was granted, but only after *all* the judges of the El Dorado County Superior Court recused themselves and a visiting judge was assigned the case. Justice was hardly swift in clearing that procedural hurdle: Respondents' motion to stay, filed in April, 1996, was not heard until July, 1996, and the court's ruling was not entered until September, 1996 - a *five-month* delay.

Briefing was completed to and the case was orally argued before the Ninth Circuit on April 16, 1997. Its unanimous Panel decision, filed May 21, 1997, affirmed the district court's dismissal and held that the actions of neither Knowles nor of his other 17 co-Respondents individually or conspiratorially constituted the state action necessary to support federal jurisdiction over Petitioners' 42 USC §1983 claims for relief. AX A. Unaddressed by the Panel was the question timely preserved and presented of whether homosexuals are a protected class for purposes of Petitioners' 42 USC §§1985(3) and 1986 claims, an issue ripe for reconsideration in light of *Romer v. Evans*, 116 S.Ct. 1620 (1996).

Petitioners now seek *certiorari* on the grounds that

recurring issues of national and exceptional importance relating to the fundamental right to vote remain unresolved in this case. This Honorable Court is the sole forum capable of redressing the unaccepted and unusual departures from the normal course of judicial proceedings undertaken by the Ninth Circuit in its cursory treatment of this case's unconsidered facts and unexamined questions.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Applied Too Strict A Standard of Review

The opinion below rightly noted that *de novo* review required it to "take all allegations of material fact ... as true and construe them in the light most favorable to the Plaintiffs" and uphold dismissal only if "it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." AX A-5.

Beyond these general standards, however, the Ninth Circuit did not proceed to review the FAC under more specific, and liberal, standards governing civil rights complaints like that at issue here. The Panel recognized neither that reasonable inferences must be drawn from the facts pled, *NL Industries, Inc. v. Kaplan*, 23 F.3d 226, 228 (9th Cir. 1986), and construed as best benefitting the pleader, *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), nor, where more than one inference may flow, those to be adopted are whichever support valid claims. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). No matter how unlikely or improbable of proof the alleged facts are, they must be taken as true. *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). A complaint should proceed if the facts support

any valid theory of relief, *Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985), not just those pled. Dismissal is "especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development," *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2nd Cir. 1995) (*sua sponte* dismissal of *pro se* §1983 voting rights claim), or in civil rights actions, which "should be scrutinized with special care." *Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716, 724 (6th Cir. 1996); *Bernheim v. Litt*, 79 F.3d 318, 321 (2nd Cir. 1996).

> "'*...§1983 provides a 'uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation,' ... and is to be accorded 'a sweep as broad as its language.*'" *Felder v. Casey*, 487 U.S. 131, 139 (1988) (emphasis added).

The Panel cited none of these expanded but accepted criteria in affirming dismissal; the reasonable inference flowing from their absence is that they were ignored, a departure from accepted practice meriting *certiorari*.

II. The Ninth Circuit Ignored Facts Pled or Capable of Being Pled

That part of the Panel's opinion stating its view of the facts in this case is revealing for what it omits. In the FAC and in the governing law are found the following factual allegations that were lost in the Panel's opinion.

1. County central committees exist and operate "solely by virtue of, under and in furtherance of the laws of [California], including, but not limited to Cal. Elections Code

(CEC) §7250-7470 and 18540-18700." AX E, at ¶2.[1] Central committee election costs, unlike others, are borne by the state, not the candidates themselves. *Cf.*, CEC §§10502b and 10520 with CEC §8104. *See also,* CEC §§8144 (certification of central committee elections) and 7000 (reporting members to Secretary of State).

2. While noting that Johnson and Wadsworth leased the Ranch to a Democratic candidate for a fundraiser, AX A-3, the Panel ignored Petitioners' allegation that this practice was "engaged in by at least one other Defendant with respect to his own property, but without the same consequences [i.e., removal] that Petitioners suffered," AX E,

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[1]CEC §§7400-7444 are a comprehensive regulatory plan embracing how state officials may hold or appoint to committee membership (§§7404-7406); the requirement of an oath before a state-certified officer under Article XX, Sec. 3 of the state constitution to "support and defend the Constitution of the United States and the Constitution of the State of California ... " *not the bylaws of a member's party* (§7408); how vacancies are filled (§§7409 & 7410); the limited bases for removals (§§7411 & 7413); monthly use of state buildings for committee meetings without charge (§7430) and committees' limited discretion in making rules and regulations such as the bylaws under which Johnson and Wadsworth were twice ousted (§7442). These statutes are much more detailed than the sections of the CEC regulating the state central and district committees, probably because central committee members are primarily elected, not appointed. It is reasonable to infer that the Legislature, if not the parties themselves, recognized the potential for, if not experienced actual, misconduct in central committee elections and regulated them more to prevent voters' rights from being abused. Indeed, CEC §15470 states both the obvious rule that central committee candidates "who receive the highest number of votes shall be declared elected" and the more subtle proviso that no such candidate shall be elected unless he has received at least enough votes as he would have been required to obtain in signatures needed to place his name on the ballot. Clearly, these laws were enacted to prevent either manipulation of central committee elections or frustration of their results by cliques.

at ¶16, and that this lease "specifically provided that neither [Petitioners'] name would be used in connection with the fundraiser," per the Committee's bylaws. AX E, at ¶9.

3. Adjunct to Knowles' membership in the California Assembly, he maintained his local legislative office in the same suite occupied by the Committee, where he allegedly displayed campaign materials on his own behalf in violation of state and county laws "prohibiting such politicking in Central Committee offices, but acquiesced to by certain members" of the Committee, including Respondents. Moreover, his former legislative aide Becker and his appointee Laveta Stelzmiller were Committee members who twice voted to remove Petitioners and, "along with other members of his legislative staff," were directed by Knowles "on the 'official' time and expense of the California State Assembly, to ... bring about the ouster of Johnson and Wadsworth from the Committee." AX E, at ¶¶3 and 15.

III. The Ninth Circuit Downplayed Assemblyman Knowles' Position and Power

The Panel's opinion properly recognized that "Knowles, in his capacity as a member of the California Assembly, is a public official," but erred in finding that his

> *"ex officio* membership on the Committee derives from his position as the Republican nominee for the Assembly, not from his status as a California Assemblyman.[2] ...

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[2]In 1995, Knowles was completing his last Assembly term, per California's term limits law. CEC §7404b provides that if the party's nominee receives less votes for the office he seeks than a write-in candidate does, the write-in assumes *ex officio* membership on the

> Knowles has the same rights and powers as the other Committee members, with one immaterial exception: As an incumbent office holder, Knowles can appoint an alternate Committee member to vote in his stead without the Committee's authorization. Cal. Elec. Code §7406. Thus, Knowles's status as an Assemblyman gives him no direct power over the Committee and its actions; he has no greater power on the Committee as an Assemblyman than any other Committee member has as an elected member." AX A-7, citing CEC §7404. *Cf.*, §7404a.

The district court and the Panel misread CEC §7406 by holding "the only advantage gained by virtue of Knowles' status as an Assembly member is that the Committee cannot withdraw his power to appoint an alternate," compared to the Committee's "discretion to give this authority to any ex officio member, whether an incumbent officeholder or not." *Cf.* AX A-7. Comparing §7406 to §§7404 and 7405 reveals that only incumbent, *ex officio* Committee members' appointive authority is unfettered by committee discretion; non-incumbent *ex officio* members' appointive authority remains subject to Committee discretion.

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committee, provided he is a Republican. The position is thus not a private position, but one created by state law for the elected Republican officeholder; a Republican nominee may be an *ex officio* member only when a non-Republican holds the office the nominee seeks. However, even the status of nominee stems from a public vote. An Assembly nominee is the winner of a public primary in which he is listed on a state ballot, in a primary conducted by the state, whose results are compiled by the Secretary of State. CEC §15501. Although Knowles obtained his position as a nominee, he could not have kept it if a write-in Republican had been elected to the Assembly instead of him.

Nor do the grounds for removal stated in CEC §§7411 and 7413 apply to *ex officio* committee members like Knowles. The *ex officio* position reserved for an elected state official, even if codified as for a nominee, is thus materially more secure than the position held by one elected or otherwise appointed to a committee.

It is certainly reasonable to infer that he who holds unqualified, more secure power holds greater power and influence over those with lesser power, i.e., over Committee members other than incumbent *ex officios* like Knowles, the only such Committee member alleged to have acted in Johnson and Wadsworth's removal. It is similarly reasonable to infer that such a member's views receive more credence and respect from Committee colleagues than do those of one subject to either Committee discretion or statutory removal, along with that materially enhanced status and credibility normally accompanying public office, whether as a nominee or as an incumbent.

The Panel thus mistakenly held that Knowles' *ex officio* Committee membership, initially granted by CEC §7404a when he was nominated for the Assembly, was not subsequently - or materially - enhanced by his election thereto. Moreover, the FAC pled that Knowles was an *ex officio* Committee member "by virtue of his status as a member of the California Assembly," AX E, at ¶3, not by virtue of his former status as Assembly nominee, even if that legal and factual inference is similarly, but not equally, true. The Panel should have accepted this material allegation as controlling and neither weighed it against nor replaced it with competing inferences from Knowles' nominee status that destroyed Petitioners' claim, contrary to *Moore* and *Columbia Natural Resources, supra.*

The Panel cited *West v. Atkins*, 487 U.S. 42, 49 (1988), for the rule that a "person acts under color of state law if he 'exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" (quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941), and noted that "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991), quoting *West, supra*, at 49-50. But, the Panel omitted the sentence from *West* just before the one it chose to quote: "It is firmly established that a defendant acts under color of state law *when he abuses the position given to him by the state*." *West, supra*, quoted in *Dang, supra* (emphasized in *Dang*). AX A-6.

"Misuse of power, possessed by virtue of state law and possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of law." *Classic, supra,* at 326, cited approvingly in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982), and *Dang, supra*, at 479. Knowles' greater potential for influence and its misuse was possible only because his Assembly seat gave him power undiminished by Committee discretion and a Committee seat less subject to loss.

The Panel ignored an earlier decision of the district court, *Anthony v. County of Sacramento*, 845 F.Supp. 1396 (ED, CA: 1994), but stretched across circuit lines to find support for dismissing the FAC in *Murphy v. CTA*, 638 F.Supp. 464, 467 (ND, IL: 1986). AX A-6. *Murphy* cannot control resolution of this appeal but a closer reading of it is instructive. Again, the Panel omitted key language just before that it quoted. "The Supreme Court ... also has required that the acts of state employees be under 'pretense'

of some state law." *Dang, supra*, quoting *Screws v. U.S.*, 325 U.S. 91, 111 (1945). *"For conduct to relate to state authority, it must bear some similarity to the nature of the powers and duties assigned to the defendants." Dang, supra*, at 480, quoting *Murphy, supra*, at 468 (emphasis original).

"Whether Knowles's actions related to the duties and powers incidental to his position as an Assemblyman or instead related to his role as a member of the Republican party," AX A-6 - 7, should have been answered in the former's favor. The facts pled show a clear connection between Knowles' *ex officio* Committee membership, his greater appointive power, heightened security of position and resulting enhanced credibility and prestige, and the subsequent ouster of Johnson and Wadsworth and violation of his own constituents' Constitutional rights. Knowles' "duties and powers incidental to his position as an Assemblyman" included appointive rights as an *ex officio* Committee member and a Committee seat at least as secure as that he held in the Assembly. Just as a Sheriff's duties include guarding his inmates' rights, *Anthony, supra*, an Assemblyman's include protecting his constituents' rights. Just as "[t]he Government is prohibited from retaliating for the lawful exercise of constitutional rights," *id.*, at 1400, its officials are bound. If a jury concluded from evidence supporting the pleadings in this case that Knowles "used his government position to exert influence and ... control" over his co-defendants to all Petitioners' detriment, its verdict would be upheld. *Dang, supra*, at 480.

The Panel cited *Laxalt v. McClatchy*, 622 F.Supp. 737 (NV: 1985), in stating that "[A]ll actions of a government official are not, simply by virtue of his official's government employ, accomplished under the color of federal law."

AX A-7. Laxalt's misconduct was using Senate stationery to demand a retraction, as required by Nevada libel law. "In so doing, he acted as would have any private citizen considering the possibility of filing suit for libel." *Id.*, at 747. Indeed, a public official with "greater access to the channels of effective communication," *id.*, at 748, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), "must exercise that opportunity." *Id.*, at 747.

Here, however, there was no such obligation incumbent upon Knowles and the law underlying Plaintiffs' civil rights claims is state, not federal, law; this is not a *Bivens* case. "The substantive law will identify which facts are material" in this case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); the Panel's unsupported conclusion that Knowles' unrestricted appointive power is "immaterial" will not. The fact of Knowles' dually enhanced power flowing from his Assembly seat, derived from the substantive law of California's Elections Code, is material to, if not dispositive of, his liability. *Laxalt* has no precedential or factual value in resolving the state action question presented by this case and the Panel erred in relying on it instead of on the allegations and inferences of the FAC.

IV. The Ninth Circuit Cast the Committee and Its Members Out of Their State Roles

The Panel's Opinion again stretched too far in asserting that "county central committees of political parties are private actors, not public agencies, even though they are regulated by the state." AX A-8.[3] Petitioners make no

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[3]This assertion stems from the first opinion in *SF County Democratic Cen. Com. v. Eu*, 792 F.2d 802 (9th Cir. 1986), vacated and remanded "for further consideration in light of *Tashjian v. Republican*

claim that central committees are state actors for all purposes. Petitioners argue, and the caselaw allows, that in the limited context of regulating their popularly elected membership, central committees should be considered state actors subject to federal constitutional constraints.

In *Moore v. Panish*, 32 Cal.3d 535 (1982), California's Supreme Court allowed a committeeman to hold his seat and to run for another public office, but with this *caveat* ignored by the Panel:

> *"We are not unmindful that the federal courts have viewed certain racially discriminatory activities of political parties as state action which violated constitutional guarantees. Even in these cases, however, the courts have refused to characterize political parties as public organizations, but have focused instead on the impact of party primaries and membership rules on the effective exercise of the right to vote.* ... We hold that

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Party of Connecticut," [479 U.S. 208 (1986)] in *Eu v. SF County Democratic Cen. Com.*, 479 U.S. 1024 (1987). Subsequently, the Ninth Circuit concluded "*Tashjian* supports our previous decision and [we] accordingly reinstate our *judgment* affirming the district court *for the reasons set forth in this modified opinion*," thereby replacing the judgment's first rationale. *SF County Democratic Cen. Com. v. Eu*, 826 F.2d 814, 818 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) (emphasis added). However, the closest any of those reasons came to defining a committee was the Ninth Circuit's rather resigned admission that "The status of these committees under the Elections Code is less clear than the State would have us believe." *Id.*, at 825, fn 20. In neither encounter with *Eu*, nor in any other case, has either Court held central committees private actors for all purposes; they only held that they are not state actors who forfeit their I Amendment rights. Nor did the last two *Eu* cases consider either *Moore v. Panish* or *Malone v. Sup. Ct., infra.*

> the prohibition of dual candidacy contained in section 6402, subdivision (b) does not apply to the selection of members to party county central committees, but *express no opinion of whether party offices might be considered public for some other purposes." Id.*, at 545, fn 10. See also, *Unger v. Sup. Ct.*, 37 Cal.3d 612, 615 (1984): "... such entities are not agencies of the state for *all* purposes, ..." (emphases added).

In *Malone v. Sup. Ct.*, 40 Cal.2d 546 (1953), California's Supreme Court held that courts' reluctance to interfere with political committees' affairs does not render them immune from review.

> "Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such a question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization [of] rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority. ... Certainly where civil and property rights rather than politics and political dogma are involved, the courts will protect them." *Id.*, at 551 (citations omitted).

The FAC pled that central committees exist and operate "solely by virtue of, under and in furtherance of" California law, AX E, at ¶2, that Johnson and Wadsworth were elected to and ejected from the Committee under color of California law, AX E, at ¶¶7 and 28; but were removed from the Committee not for reasons allowed by statute, but because they were gay. The Panel should have accepted this allegation as true since it was ruling on a FRCvP 12b6 motion to dismiss. One of Petitioners' rights, as "members of a party committee elected at a primary election conducted under public authority," was not to be thrown off the committee contrary to statute. Homosexuality is not a statutory ground for removal and Johnson and Wadsworth's right to keep their seats, and their electors' right to have their electoral choices remain on the Committee, are interests protected by federal court review.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), stemming from a public office primary, provides a federal counterpart. After warning that federal courts should not endorse §1983 suits in "garden variety election irregularities," *id.*, at 1076, the court held that

> "[t]he right to vote remains, at bottom, a federally protected right. *If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. ... [T]he question of the availability of a fully adequate state corrective process is germane.* But there is precedent for federal relief where broadgauged unfairness permeates an election, even if derived from apparently neutral action. *Cf. Brinkerhoff-Faris Co. v. Hill*, 281

> U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).
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> * * *
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> *In cases falling within such confines, we think a federal judge need not be timid, but may and should do what common sense and justice require."* *Id.*, at 1077-8, allowing both class action status and relief under §1983 (emphases added).[4]

The Panel erred in interpreting the four state action tests narrowly instead of broadly in this civil rights case, per *Felder v. Casey*, *supra*. The public function test, especially in election cases, is hardly as constricted as the Panel stated. While *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-158 (1978), defined a public function as the private exercise of sovereign powers, state action may also exist in contests other than "state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Id.*, quoting *Terry v. Adams*, 345 U.S. 461, 484 (1953). The Court also noted "that the conduct of the elections themselves is an exclusively public function" and that the "ordinary commercial transaction" therein did not merit the "special provision to protect equal

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[4]*Cf.* Respondents' oaths upon assuming Committee membership to "uphold and defend the Constitution and laws of the United States and of ... California," with their disregard of due process in ousting Petitioners; *query*, whether or not taking such an oath is a consent to federal jurisdiction for purposes of enforcing it. The five-month delay in finalizing the ruling on Respondents' motion to stay Petitioners' Superior Court action demonstrates the inadequacy of the "state corrective process" and provides a compelling reason to exercise federal question jurisdiction in this case, if not, ironically, to exercise federal diversity jurisdiction under the "local prejudice" rationale illustrated by the impasse in El Dorado Superior Court. *Cf.* 28 USC §1343a.

access to the ballot" codified in 42 USC §1971a1; the political arena is especially deserving of Constitutional safeguards as one of the "very few ... 'exclusively reserved to the State.'" *Id.*, at 158 and fn 7.

In *Morse v. Republican Party of Virginia*, 116 S.Ct. 1186 (1996), the Court expanded this theme and when political action was state action in a Voting Rights Act challenge to a poll tax Virginia Republicans imposed upon their members. Going beyond the bounds set by *Flagg*, the Court held that "the Party exercised delegated state power when it certified its nominee for automatic placement on Virginia's general election ballot." *Morse*, *supra*, at 1193-4.

Central to its decision were the "white primary cases" underlying the 1965 Act. *Id.*, at 1201-1206; *Terry, supra*, and *Smith v. Allwright*, 321 U.S. 649 (1944). The Court did not limit those cases to race discrimination election disputes. *Morse*, *supra*, at 1204, and *Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289, 1293 (1995) ("The White Primary cases teach that realities, not labels, must guide our review of election laws."). *Accord*, *Smith v. Salt River Project*, 109 F.3d 586, 591 (9th Cir. 1997), quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Nor did the Court find either *Flagg* or *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), precluded finding state action by a political party "unless its nominees are virtually certain to win the general election." *Morse*, *supra*, at 1207. Finally, in quoting from its holding in *Eu, supra*, at 232, to justify intervention where "'necessary to prevent the derogation of civil rights of party adherents' (citing *Smith*)," the Court doubted that finding jurisdiction would "abridge associational rights protected by the First Amendment." *Morse*, *supra*, at 1209-10.

Discrimination against homosexuals cannot be distinguished from discrimination against Blacks, *cf. Morse, supra*, at 1204; the right protected - the right to vote and to have one's vote count (*U.S. v. Mosley*, 238 U.S. 383, 386 (1915) - is fundamental and its guarantees apply across all lines.[5] "Generally speaking, the Supreme Court has required that parties be inclusive, allowing all interested persons to participate in party activities." *Republican Party of Arkansas, supra*, at 1294. Precluding Plaintiffs from the political process pursuant to their sexuality is inconsistent with the Constitution's guarantee of equal protection. *Romer v. Evans, supra.* See also, *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996): "Of course *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986),] will soon be eclipsed in the area of equal protection by ... *Romer v. Evans*[,]" and *Holmes, supra.* (Reinhardt, J., dissenting)

The Panel's opinion relied upon two decisions to support its finding no state action, presumably under the public function test, but neither is binding, each is distinguishable and both admit state action might exist in some

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[5]"*The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women and other minorities.* (See, e.g., *Gay Students Org. of Univ. of New Hampshire v. Banner* (1st Cir. 1974) 509 F.2d 652, 657; *Acanfora v. Board of Education of Montgomery County* (4th Cir. 1974) 491 F.2d 498, cert. den., 419 U.S. 836 [42 L.Ed.2d 63, 95 S.Ct. 64]; *Aumiller v. University of Delaware* (D.Del. 1977) 434 F.Supp. 1273, 1292-1302.)" *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal.3d 458, 488 (1979). *Cf., Watkins v. US Army*, 875 F.2d 699, 719, 724-731 (9th Cir. 1989) (Norris and Canby, JJ., concurring); *Holmes v. California Army National Guard*, - F.3d - (9th Cir. 1997) (Reinhardt, J., dissenting); *Evans v. Romer*, 882 P.2d 1335, 1355 (CO: 1994) (Scott, J., concurring) and *Romer v. Evans*, 116 S.Ct. 1620, 1623, 1628 (1996) (emphasis added).

circumstances. *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), involved an Ohio law that made its central committees "responsible for filling vacancies that occur in certain county offices formerly held by party members." *Id.*, at 1194. The Sixth Circuit held that while not

> "all actions of a central committee constitute state action[, w]hen performing the narrow duties assigned to it under section 305.02 the Central Committee of the Republican Party may well be engaging in state action. *State ex rel Hayes v. Jennings,* 173 Ohio St. 370, 374, 182 N.E.2d 546 (1962) ("[t]he power conferred by Section 305.02, Revised Code, upon central committeemen makes them public officers.")" *Id.*, at 1194-1195.

"Intra-party elections of *officers* is not 'state action.'" *Federspiel v. Ohio Republican Party*, 867 F.Supp. 627, 623 (1994), citing *Banchy, supra*, at 1196. (emphasis added). While in *Banchy*, committee members retained their basic intra-party elective offices and lost only their opportunity to elect their intra-party officers, Petitioners lost much more: Johnson and Wadsworth, their positions as twice-elected committeemen; all other Petitioners, their elected representatives, through whom they hoped to influence the Committee's actions during each's terms. (*Cf.*, *Federspiel*, *supra*: "election of different members is the best way to change their decisions. ... This is the democratic process at work.")

In *Blank v. Heineman*, 771 F.Supp. 1013 (NE: 1991), a committee chairmanship was lost but committee membership remained intact; no state action was found. *Id.*, at 1014. Here, Respondents disallowed even that vestige of

the electorate's trust in Johnson and Wadsworth and contravened their expressed will by depriving them of their elected representatives and saddling them with a rejected candidate. The same distinction exists between *Federspiel, supra*, (committee officers vs. executive committee members) and this case: elementary elective office, the basis of a republican form of government, not higher intra-party office or political parties' right to "select their leaders," was violated by Respondents' acts. AX A-11.[6]

Wadsworth's Committee membership was not that of an officer; he had barely mounted the ladder of party management before he was knocked off it by the same clique for the second time in as many years. If such abuse of the fundamental right to vote does not shock the conscience, it surely goes beyond a simple intra-party dispute and violates the integrity of the electoral process, the basis for any democracy. *Burson v. Freeman*, 504 U.S. 199, 214 (1992); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964), and *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886).[7]

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[6]The public office/private post distinction should not control because any distinction between the two was blurred by both the position Knowles held on the Committee by virtue of his Assembly seat and by Respondents' ejecting Johnson and Wadsworth at his bidding. His prestige and influence, along with his local office's location in the Committee's own headquarters, also tightens the nexus between a purportedly private committee and those State officials who hold both their own, and the power to appoint alternate, membership on it.

[7]That Petitioners do not claim "Defendants violated their constitutional rights by conducting an election in an unconstitutional manner," AX A-10, is no bar to relief. That they were twice thrown off of the Committee after twice being voted onto it is enough: whether acting before, during or after the election, Respondents compromised its results as surely as if they had not allowed it to go forward at all. The reality of Respondents' removing Johnson and Wadsworth, whatever label was

"The joint action test for state action is met where private persons are 'willful participant[s] in joint activity with the State or its agents" that effects a constitutional deprivation." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983). Petitioners' allegations of how Assemblyman Knowles caused their removal satisfies this state action test since a conspiracy was pled. Even if his co-Respondents acted privately, Knowles' state actor status makes them liable too. *Adickes v. Kress*, 398 U.S. 144, 152 (1970).

The state compulsion test justifies finding state action in the facts of this appeal, despite the Panel's opinion that *Adickes* "simply bears no similarity to the present case." If none of the cited provisions of the CEC "compelled or encouraged the Committee to remove Johnson and Wadsworth on the basis of their sexual orientation," they set the basis for an uncodified practice or "custom of removing Committee members on the basis of homosexuality." AX A-12; *cf.* AX E at ¶27 and *Adickes, supra*, at 168. With two elections and two ejections a matter of record, the situation is clearly "capable of repetition, yet avoiding review."[8]

Finally, Petitioners have demonstrated a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be

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slapped over it, was the loss of their right to participate in the political process at its primary level and the disenfranchisement of 1500 voters.

[8]Respondents' actions are protected from electoral demise as well, since the opinion stifles popular input into party politics. Because the Panel's prevented "nipping in the bud" the practices complained of, they can grow unimpeded to preclude homosexuals - or anyone else with views of a Republican Party different from Respondents' - from entering party politics while preventing them from judicially redressing this deprivation, a two-fold equal protection violation per *Romer, supra.*

fairly treated as that of the State itself." AX A-13, quoting *Jackson, supra*. As an Assemblyman, Knowles used the power, prestige and placement of his office and effectively "insinuated [him]self into a position of interdependence" with the Committee so that it readily participated in discriminating against and ousting Johnson and Wadsworth. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).[9]

> "Membership in the Central Committee is recognized as a de facto prerequisite to higher office, both elected and appointed, within the Republican Party at the county, state and national levels, and within municipal, county, state and national government, and thereby benefits government with a pool of persons presumably experienced in the workings of the democratic process within the republican form of government guaranteed by the Constitution of, and throughout, the United States." AX E, at ¶2.

These allegations reflect political reality, *Republican Party of Ark., supra,* and *Stout v. Democratic County Central Committee*, 40 Cal.2d 91, 94 (1952): "committeemen perform important duties as a means through which the right of suffrage is exercised ..." and are not so conclusory as to be disregarded. *Western Mining Council v. Watt*, 642 F.2d 618, 624 (9th Cir. 1981). Committees act symbiotically with the State, both in using State facilities and services - and in being used by State actors like Knowles.

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[9]The restaurant's lease that provided the nexus in *Burton* is directly analogous to the use of State facilities permitted in CEC §7430 and Knowles' use of the Committee's headquarters as his own local office.

V. The Ninth Circuit Ignored the Issue of Whether 42 USC §§1985(3) and 1986 Claims Were Pled

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court stated, without further limitation, that §1985(3)'s

> "... language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.*, at 102 (italics original).[10]

Petitioners pled that Respondents threw them off the Committee because they were homosexuals, clearly a "class-based invidiously discriminatory animus," under *Romer, supra*, and the rights to vote and to participate in the political process are clearly secured to all.

Dismissing Petitioners' claim under 42 USC §1985(3) without leave to amend, the district court relied on *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 332 (9th Cir. 1979), and *High Tech. Gays v. DISCO*, 895 F.2d 563, 574 (9th Cir. 1990), holding that homosexuals are not a suspect

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[10]If Plaintiffs must show state action for their §1985(3) claims to proceed, given the Court's fractious 5-4 decision in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), they have done so. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), discussing when *stare decisis* applies, should be reviewed with an eye towards revisiting *Scott*. *Scott* did not bar §1985(3) class-based *animi* other than racial ones; it only barred claims of "bias towards others on account of their *economic* views, status or activities." *Id.*, at 836 (emphasis original).

class for §1985(3) purposes. Behind both cases lurked *Doe v.Commonwealth's Attorney*, 403 F.Supp 1199, 1202 (ED, VA: 1975), also one of the bases for *Bowers, supra*, upon which *High Tech. Gays, supra* was itself based. *Id.*, at 571. *DeSantis* noted that:

> "... While §1985(3) has been liberated from the now anachronistic historical circumstances of reconstruction America, we may not uproot §1985(3) from the principle underlying its adoption: The Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights. This underlying principle must continue to determine the coverage of §1985(3).
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> * * *
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> ... it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals." *Id.*, at 333.[11]

In *Bowers, supra*, the issue being decided was "whether

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[11]Even if *DeSantis'* rationale that "special federal assistance" is required to find suspect class status, such "assistance" may be found, ironically, in the "Don't ask, don't tell" military policy. While the vitality of that policy is unknown, *cf.*, *Able v. U.S.*, - F.Supp. - (ED, NY: 1997) (dead) and *Holmes v. California Army National Guard*, - F.3d - (9th Cir. 1997) (alive), its purported provision of due process in military discharges of gays and lesbians nevertheless constitutes one form of special federal "assistance" directed at, if not for, homosexuals, and reinforces *Romer*'s finding that they are a discrete class.

the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.*, at 190. *Bowers* neither addressed nor decided if homosexuals, as a class, merited equal protection, the Court specifically noting that "Respondent does not defend the judgment below based on the ... Equal Protection Clause, ..." *Id.*, at 196, fn 8. Issues of the fundamental right to vote and to participate in political activity under the due process and equal protection guarantees were also left for another case.

That other case is *Romer v. Evans*, *supra*, which one Court of Appeals has already recognized seriously undermines *Bowers.*[12] *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996). *Romer* recognized that

> "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. ... Respect for this principle explains why laws singling out *a certain class of citizens* for disfavored legal status or general hardships is rare. A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. *'"The guaranty of equal protection of the laws is a pledge of the protection of equal laws."'"* *Id.*, at 1628

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[12]And which another Court of Appeals still seems unable to swallow over a year after being force-fed *Romer* on remand. 116 S.Ct. 2519 (1996), vacating and remanding (and awaiting) *Equality Fdn. of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

(emphasis added; citations, including *Yick Wo, supra*, omitted).

Romer held that Colorado law's prevented homosexuals from securing protection against the injuries protected by both its general public-accommodation laws and by its "specific legal protections for this targeted class," *id.*, at 1626, with no rational relationship to any legitimate state purpose. *Id.*, at 1629. Thus, this Court allowed that homosexuals may be a discrete class under the law and confirmed that *Bowers*, its progeny and predecessors do not bar homosexuals, as a class, from equal protection of the laws. Continued reliance upon either *DeSantis* or *High Tech Gays* is thus mistaken. There should be no doubt, after *Romer*, that homosexuals are an identifiable class entitled to equal protection of the law.

CONCLUSION

Petitioners have shown that Assemblyman Knowles and the Committee were state actors under the facts of this case. Their allegations that their expulsion from the Committee was based on their membership in a disfavored class should have been addressed by the Ninth Circuit. That it was not is another departure from accepted principles of jurisdiction that should be remedied by granting *certiorari*.

Respectfully submitted

G. MICHAEL GERMAN
Counsel of Record
22 Second Street - 310
San Francisco, CA 94105-3406
(415) 536-1838
Attorney for Petitioners

AX A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL D. JOHNSON; KEVIN WADSWORTH; TED COOPER; LAUREN COOPER; RAY SEBASTIAN,
Plaintiffs-Appellants,

v. No. 96-15852

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS,
Defendants-Appellees.

D.C.No. CV-95-00835 MLS (PAN)

OPINION

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted
April 16, 1997 - San Francisco,California

Filed May 21, 1997

Before: Charles E. Wiggins, John T. Noonan, and Stephen S. Trott, Circuit Judges.
Opinion by Judge Trott

OPINION

TROTT, Circuit Judge:

OVERVIEW

Paul Johnson and Kevin Wadsworth, a gay couple, and a putative class of El Dorado County, California Republicans who elected Johnson and Wadsworth to the County's Republican party central committee (collectively, the "Plaintiffs") appeal the district court's order dismissing their 42 U.S.C. §1983 action for failure to state a claim.[1] They alleged in their Complaint that David Knowles - a member of the California Assembly and *ex officio* member of the El Dorado County Republican Party Central Committee (the "Committee") - and 16 other Committee members (collectively, the "Defendants") conspired to oust Johnson and Wadsworth from their elected posts on the Committee because of their sexual orientation. This conduct, the Plaintiffs contend, violated their First Amendment rights to free speech and participation in the political process and their Fourteenth Amendment right to equal protection.

The district court ruled that the Committee's conduct was not action "under color of state law" and dismissed their claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. S 1291, and we affirm.

BACKGROUND

Since 1978, Paul Johnson and Kevin Wadsworth have lived

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[1]The motion of the Bay Area Lawyers for Individual Freedom to file a brief as amicus curiae is denied.

together as exclusive life partners in a homosexual relationship.[2] For more than ten years, they have been active members of the California Republican Party, registering to vote as Republicans and serving on several Republican central committees in California.

Under the California Elections Code, members of county central committees are elected every two years at the direct primary election. Cal. Elec. Code §7420. In both 1992 and 1994, Johnson and Wadsworth ran for and were elected to the El Dorado County Republican Central Committee. In these elections, they each received approximately 1500 votes.

Johnson and Wadsworth own and reside at the Lone Antler Ranch in El Dorado County. On August 25, 1994, they leased part of the ranch to the "Katie Hirning for Congress Campaign" for a fundraiser for Katie Hirning, the Democratic candidate in the November 1994 California Fourth Congressional District election. The "Katie Hirning for Congress Campaign" paid $100 to use the ranch. Neither Johnson nor Wadsworth participated in the fundraiser.

Defendant David Knowles is an elected Republican member of the California Assembly for the Fourth Assembly District. By virtue of his status as the Republican party nominee for the Assembly, Knowles also is an *ex officio* member of the Committee. Cal. Elec. Code §7404(a). According to the Plaintiffs, Knowles actively worked to remove Johnson and Wadsworth from the Committee be-

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[2]The facts discussed herein are taken from the allegations in the Plaintiffs' First Amended Complaint. For purposes of this appeal, we assume these facts are true. *Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996).*

cause of his alleged prejudice against homosexuals. He allegedly vowed to "get rid of those faggots" and used his power and influence as an Assemblyman to bring about their ouster.

On September 12, 1994, the Committee held a regularly scheduled meeting and, in the absence of Johnson and Wadsworth,[3] voted 13 to 1 with 3 abstentions to remove Johnson and Wadsworth from the Committee for providing support to Democratic candidates (i.e., for renting their ranch to the Hirning campaign). Although Knowles was not present at the meeting, he allegedly instructed other committee members to vote in favor of Johnson's and Wadsworth's removal. The Committee had not provided Johnson and Wadsworth with any notice that action was to be taken against them at this meeting.

Following the ouster, Johnson resigned his Republican party membership in disgust and re-registered as a Democrat. Wadsworth, however, continued as a Republican and, in January 1995, took his seat on the Committee that he had won in the June 1994 primary.[4]

On January 9, 1995, the new Committee held its organizational meeting. Wadsworth was sworn in to his new, elected seat on the Committee. The Committee elected officers, and, over Wadsworth's objection on the ground of

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[3]Johnson was in Ohio attending his father's funeral. Wadsworth left the meeting early because he had undergone medical treatment earlier that day and had begun to feel ill.

[4]Wadsworth was ousted from the seat that he won in the 1992 primary. At the time of his ouster, however, he had already been elected to the Committee in the 1994 primary. Thus, he was able to rejoin the Committee after his ouster as a newly-elected member.

inadequate notice, adopted new bylaws, including a provision for disciplinary procedures that enabled the Committee to remove members whose actions were deemed "injurious to the Committee." At the end of the meeting, Defendant Tom Emigh, a Committee member, indicated that he would seek Wadsworth's removal at the next scheduled Committee meeting.

On February 13, 1995, at the next Committee meeting, Defendant Emigh moved to remove Wadsworth. The Committee voted 9 to 3, with 1 abstention, to remove Wadsworth. Although Knowles was not present at the meeting and did not vote for Wadsworth's removal, he allegedly instructed, prevailed upon, or otherwise influenced other Committee members to vote for Wadsworth's removal. The Committee's stated grounds for Wadsworth's removal included Wadsworth's alleged public criticism of the Committee and his alleged support of Hirning's campaign. Knowles, however, allegedly told Defendant Tom Schumacher, a Committee member, that he encouraged Wadsworth's removal because of his homosexuality.

STANDARD OF REVIEW

We review de novo a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (1996). A complaint should not be dismissed unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Id.* In reviewing the dismissal, we must take all allegations of material fact in the Complaint as true and construe them in the light most favorable to the Plaintiffs. *Smith,* 84 F.3d at 1217.

DISCUSSION

To state a claim for relief under section 1983, the Plaintiffs must plead two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused them to be deprived of a right secured by the Constitution and laws of the United States. *Howerton v. Gabica,* 708 F.2d 380, 382 (9th Cir. 1983). Because the Plaintiffs have failed to show that the Defendants acted under color of state law and fail to point to any way that such action can be shown, we affirm the district court's order dismissing the Plaintiffs' claim with prejudice.

I. Assemblyman Knowles

A person acts under color of state law if he "exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins,* 487 U.S. 42, 49 (1988) (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)). "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Dang Vang v. Vang Xiong X. Toyed,* 944 F.2d 476, 479 (9th Cir. 1991).

There is no doubt that Knowles, in his capacity as a member of the California Assembly, is a public official. But even as a public official, Knowles's alleged wrongful actions are not taken under color of state law if they are " 'not in any way related to the performance of [his] duties'" as a public official. *Id.* (quoting *Murphy v. Chicago Transit Auth.*, 638 F.Supp. 464, 467 (N.D. Ill. 1986)). Thus, we must determine whether Knowles's actions related to the duties and powers of his position as an Assemblyman or instead related to his role as a member of the Republican

party.

Knowles's *ex officio* membership on the Committee derives from his position as the Republican nominee for the Assembly, not from his status as a California Assemblyman. Cal. Elec. Code §7404. As an *ex officio* Committee member, Knowles has the same rights and powers as the other Committee members, with one immaterial exception: As an incumbent office holder, Knowles can appoint an alternate Committee member to vote in his stead without the Committee's authorization. Cal. Elec. Code §7406. Thus, Knowles's status as an Assemblyman gives him no direct power over the Committee and its actions; he has no greater power on the Committee as an Assemblyman than any other Committee member has as an elected member.

The Plaintiffs argue that Knowles's Assemblyman status enabled him to exercise greater influence over the Committee. But the mere fact that the prestige of Knowles's office may have enhanced his influence over the Committee is not enough to convert his actions into state action. "[A]ll actions of a government official are not, simply by virtue of the official's governmental employ, accomplished under the color of federal law." *Laxalt v. McClatchy*, 622 F.Supp. 737, 746 (D. Nev. 1985) (holding that a United States Senator did not act under color of law when he wrote a letter on Senate stationery demanding retraction of a newspaper article).

In sum, Knowles acted against Johnson and Wadsworth only in his capacity as a member of the Committee and a nominee of the Republican party, not in his official capacity as a state Assemblyman. Thus, as the district court concluded, Knowles's actions should be evaluated on the same terms as the other Committee members for purposes of

determining whether, under the alleged circumstances, he acted under color of state law.

II. The Committee Members

Under the law of this circuit, county central committees of political parties are private actors, not public agencies, even though they are regulated by the state. *See San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987) (rejecting argument that county central committees of the Republican and Democratic parties are public entities that do not enjoy First Amendment protection), *aff'd*, 489 U.S. 214 (1989). The Plaintiffs argue, however, that even if the Committee is itself a private actor, the State of California's significant involvement in the regulation of the Committee and its election and removal processes converted the Committee's action against Johnson and Wadsworth into action under color of state law.

"Action taken by private individuals may be 'under color of state law' where there is 'significant' state involvement in the action." *Howerton*, 708 F.2d at 382. Although section 1983's under-color-of-state-law requirement is technically separate from the Fourteenth Amendment's state-action requirement, the two inquiries are closely related. *Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989). Because the Plaintiffs are required to establish state action for purposes of their constitutional claims, we treat the under-color-of-state-law requirement and the state-action requirement as equivalent. *Id.*

The Supreme Court has articulated four distinct tests for determining when the actions of a private individual amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the

governmental nexus test. *Id.* at 1148-49; see also *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996).

A. The Public Function Test

The Supreme Court has found state action present "in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). One such power that the Supreme Court has recognized as traditionally exclusively sovereign is the power to conduct elections for public officials. *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 157 -58 (1978).

The Plaintiffs argue that they were elected to their Committee offices via the primary election ballot and that the Defendants' actions in ousting them nullified the election result. Because the Defendants' conduct interfered with an election, the Plaintiffs argue that the Defendants exercised a public function.

As the district court concluded, the Plaintiffs' argument stretches the public function test too far. The Supreme Court has explicitly noted that the scope of the public function doctrine is carefully and narrowly defined. *Flagg Brothers,* 436 U.S. at 158. "The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Id.* (emphasis added). Cases in which the Supreme Court has applied the public function doctrine all have involved challenges to the electoral process for electing public officials. See *Terry v. Adams*, 345 U.S. 461, 469 (1953) (holding that Democratic party's rules for the

primary constituted state action where the primary "ha[d] become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the country"); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (holding that a party primary involves state action where the state "requires a certain electoral procedure, prescribes a general election ballot made up of party nominees and limits the choices of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot").

The Defendants' actions do not satisfy the public function test for two reasons. First, the Plaintiffs do not allege that the Defendants violated their constitutional rights by conducting an election in an unconstitutional manner. Rather, they challenge only the Defendants' actions in removing Johnson and Wadsworth from their positions on the Committee. Second, the Plaintiffs do not allege that the Defendants interfered with an election for public office. Although the Plaintiffs were elected to their positions on the Committee through the primary election ballot, they were not elected to public offices, but only to private positions within the Republican party. *See Moore v. Panish*, 32 Cal.3d 535, 545 (Cal. 1982) (membership in a political party's county central committee is not a public office, but in reality is an office of a political party).

The Plaintiffs suggest that "the public office/private post distinction should not control here," but they offer no reasoned basis for ignoring such an important distinction. The management and internal rules of a private political party are not powers "traditionally exclusively reserved to the state." *Jackson*, 419 U.S. at 352. In fact, the Supreme Court has held that, absent a compelling state interest, political parties are entitled to organize themselves, conduct their

affairs, and select their leaders in the manner they think best, without any interference from the State. *Eu,* 489 U.S. at 230. Thus, the Defendants' actions do not constitute state action under the public function test.

B. The Joint Action Test

The joint action test for state action is met where private persons are "willful participant[s] in joint activity with the State or its agents" that effects a constitutional deprivation. *Howerton,* 708 F.2d at 383. An agreement between government and a private party can create state action. *George,* 91 F.3d at 1231. The Plaintiffs argue that the Committee members conspired with Assemblyman Knowles, a state agent, and thereby acted under color of state law in depriving them of their First and Fourteenth Amendment rights.

Because Knowles acted against Johnson and Wadsworth in his capacity as a member of the Republican party, not in his capacity as an Assemblyman, the Committee's conduct cannot satisfy the joint action test. The Plaintiffs have not alleged any conspiracy between the Committee members and a government actor.

C. The State Compulsion Test

State action may be found under the state compulsion test where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982). The Plaintiffs argue that, by relying on section 7413 of the California Elections Code, which states that"[a] committee may remove any member ... who gives

support ... for a candidate for another party," the Plaintiffs received "covert, if not outright encouragement from the state for their actions."

Section 7413 in no way compelled or encouraged the Committee to remove Johnson and Wadsworth on the basis of their sexual orientation. It merely authorized the Committee to remove members if they supported other-party candidates, a lawful and legitimate basis for removal. This authorization to remove Committee members for legitimate reasons cannot convert the Committee's alleged discriminatory removal into state action.

In *Jackson,* the Supreme Court rejected a similar argument that state regulations authorizing utilities to terminate service for non-payment converted the utilities' actions into state action. The Court stated: "[The utilities'] exercise of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in so doing 'state action' for purposes of the Fourteenth Amendment." 419 U.S. at 357.

The Plaintiffs' reliance on *Adickes v. Kress,* 398 U.S. 144 (1977), is misplaced. In *Adickes*, a department store refused to serve a Caucasian teacher at its lunch counter because she was accompanied by her black students. *Id.* at 147. The Supreme Court held that she could state a claim against the department store under section 1983 if she could prove that the department store refused her service because of a state enforced custom of racial segregation. *Id.* at 170. Despite their assertion that Adickes is "similar to this appeal," the Plaintiffs point to no state-enforced custom of removing Committee members on the basis of homosexuality. Adickes simply bears no similarity to the present case.

In short, the Plaintiffs cannot point to any state regulation or custom having the force of law that compelled, coerced, or encouraged the Defendants to discriminate against the Plaintiffs. Any initiative in removing the Plaintiffs on this basis came from the Committee members, not from the State. Thus, the Defendants' actions do not satisfy the state compulsion test.

D. The Nexus Test

Finally, under the nexus test, we must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351. The only relationship between the state and the Committee alleged by the Plaintiffs is that the state regulates the Committee through the California Elections Code.

"The mere fact that a [private actor] is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment." Id. at 350. The Plaintiffs allege no facts that demonstrate that "the state ha[s] so far insinuated itself into a position of interdependence" with the Committee that it was a joint participant in the Committee's discrimination. *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961) (holding that restaurant's refusal to serve African Americans was state action where restaurant leased space in building owned by the state). Thus, the Plaintiffs have not shown state action under the nexus test.

CONCLUSION

The El Dorado County Republican Central Committee is a private political organization, not a government actor. Although the Committee conceivably could act under color of state law for some purposes, there is nothing tying the State of California to the particular decision that the Plaintiffs challenge, namely, the Committee's decision to oust Johnson and Wadsworth from the Committee on the basis of their sexual orientation. Every court that has considered similar section 1983 claims has reached this conclusion. *See, e.g., Banchy v. Republican Party of Hamilton County,* 898 F.2d 1192 (6th Cir. 1990) (Republican party did not act under color of state law in precluding members from voting for ward chairmen because of their right-to-life views); *Blank v. Heineman,* 771 F. Supp. 1013 (D. Neb. 1991) (elected officers of Republican Party did not act under color of state law in removing officers because of their evangelical Christian beliefs).

The Plaintiffs have not alleged facts showing that the Defendants acted under color of state law. Thus, we affirm the district court's order dismissing the Plaintiffs' section 1983 claim. Because we affirm on this ground, we do not reach the Defendants' alternative argument that the Plaintiffs also failed to allege violations of their First and Fourteenth Amendment rights.

AFFIRMED.

AX B-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL D. JOHNSON; KEVIN WADSWORTH; TED COOPER; LAUREN COOPER; RAY SEBASTIAN,

Plaintiffs-Appellants,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS,

Defendants-Appellees.

[FILED JUL -2 1997]

No. 96-15852

D.C.No. CV-95-00835 MLS (PAN)

ORDER

Before: Charles E. Wiggins, John T. Noonan, and Stephen S. Trott, Circuit Judges.

The parties shall file within 21 days of the date of this order simultaneous briefs on the question of whether this case should be reheard en banc. Forty (40) copies of the briefs shall be filed.

AX C-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL D. JOHNSON; KEVIN WADSWORTH; TED COOPER; LAUREN COOPER; RAY SEBASTIAN,

Plaintiffs-Appellants,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS,

Defendants-Appellees.

[FILED SEP 10 1997]

No. 96-15852

D.C.No. CV-95-00835 MLS (PAN)

ORDER

Before: Wiggins, Noonan, and Trott, Circuit Judges.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

Appellant's [sic] petition for rehearing is DENIED and the suggestion for rehearing en banc in REJECTED.

STATUTORY PROVISIONS INVOLVED

42 USC §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...

42 USC §1985(3) provides:

> If two or more persons in any State ... conspire ... for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State ... from giving or securing to all persons within such State ... the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in

person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC §1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover

not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

AX E-1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAUL JOHNSON, KEVIN WADSWORTH, TED COOPER, LAUREN COOPER, RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,	CIV-S-95-835 MLS (PAN) FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS and DOES 1 - 25, inclusive,

Defendants./

INTRODUCTORY ALLEGATIONS

1. Jurisdiction herein is based on 28 USC §§1331, 1343, 1357, 1367 2201 and venue is proper in this district because all Defendants, named and unnamed, reside herein.

2. At all times herein mentioned, Defendant REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY (Central Committee) was and is a political organization subject to the laws of this State and of the United States, organized, existing and operating solely by virtue of, under and in furtherance of the laws of this State, including, but not limited to, Cal. Elections Code (CEC) §§7250-7470 and 18540-18700, whose chairman is Defendant DAVID TITUS and whose meetings are held at 3161 Cameron Park Drive, Suite 107, Cameron Park, CA. Membership in the Central Committee is composed primarily by the election thereto of registered members of the Republican Party resident in El Dorado County by their fellow Republican electors resident in El Dorado County voting in primary elections noticed, organized, conducted, supervised and officially reported by the State of California. Membership in the Central Committee is recognized as a de facto prerequisite to higher office, both elected and appointed, within the Republican Party at the county, state and national levels, and within municipal, county, state and national government, and thereby benefits government by providing it with a pool of persons presumably experienced in the workings of the democratic process within the republican form of government guaranteed by the Constitution of, and throughout, the United States. Running and casting and receiving votes for membership on the Central Committee is also a legitimate exercise of the most elementary form of participatory democracy in a local forum as guaranteed by the I and XIV Amendments to the U.S. Constitution protecting the fundamental rights of voting, assembling and petitioning for redress and participating equally in the political process.

3. Plaintiffs are informed and believe, and allege thereon, that at all times herein mentioned, Defendants

STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER and DAVID TITUS were and/or are duly elected, alternate or appointed members of Defendant Central Committee and were acting under and in furtherance of the laws of this State, including, but not limited to, CEC §§7250-7470 and 18540-18700. Plaintiffs are similarly informed and believe that Defendant DAVID KNOWLES is an elected Republican member of the California Assembly for the 4th Assembly District who has and continues to maintain his local legislative office at 3161 Cameron Park Drive, Suite 214, Cameron Park, CA, which suite number Plaintiffs are informed, believe and allege thereon does not exist separately from Suite 107, per the records of the El Dorado County Assessor. Plaintiffs also are informed, believe and expect to discover facts supporting their further allegation that by virtue of his status as a member of the California Assembly, Defendant KNOWLES has the right and power to appoint members to the Central Committee under CEC §§7250-7470 and, using that power, exercised influence, direct and indirect, over the decisions, workings and administration of the Central Committee relevant hereto, as evidenced by his January, 1993, appointment of Defendant LAVETA STELZMILLER to the Central Committee, by his directing his former legislative aide Defendant BECKER and other members of his legislative staff, on the "official" time and expense of the California State Assembly, to vote against adoption of the Central Committee's 1994 platform drafted by Plaintiff WADSWORTH and to thereafter bring about the ouster of Plaintiffs JOHNSON and WADSWORTH from the Central Commit-

tee and by his directing the placement of campaign signs and literature supporting himself displayed to the public and within the premises of Suite 107/214 of 3161 Cameron Park Drive, Cameron Park, CA, in violation of those statutes and bylaws of El Dorado County and of the State of California prohibiting such politicking in Central Committee offices, but acquiesced to by certain members of the Central Committee, including but not limited to Defendants herein. Said Defendants are sued individually, without prejudice to Plaintiffs' right to recover and/or satisfy judgment against them or any other defendant.

4. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 25, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will amend this complaint to allege such Defendants' true names and capacities when ascertained. Plaintiffs are informed and believe, and allege thereon, that each such Defendant resides in this district, is responsible in some manner for the occurrences herein alleged and that Plaintiffs' damages were proximately caused by their conduct, acts and/or omissions.

5. Plaintiffs are informed and believe, and allege thereon, that named and DOE Defendants are, and at all times herein mentioned were, the agents and co-conspirators of their co-defendants, and in doing the things alleged herein were acting within the course and scope of such agency and conspiracy and with the supervision, permission, instruction and consent, express or implied, of said co-defendants.

6. From September, 1978, and at all times since, Plaintiffs PAUL JOHNSON and KEVIN WADSWORTH have been, and have held themselves out to third parties as,

exclusive life partners in a loving relationship; have shared living expenses, space and resources; have exchanged religious vows of commitment to each other; have traveled and vacationed together; and, more recently, have filed income tax returns consistent with their relationship and have made provisions by testamentary disposition to care for the other in the event either is incapacitated. Each is sole heir to the estate of the other, an estate held in joint tenancy.

7. Plaintiffs JOHNSON and WADSWORTH had or have been longtime (10+ years), members of the California Republican party, registered to vote thereunder and previously serving with distinction on other Central Committees in this state, and were, in 1992 and 1994, elected and reelected by their fellow Republicans of El Dorado County, Supervisorial District III, including, but not limited to Plaintiffs TED COOPER, LAUREN COOPER, RAY SEBASTIAN & BARBARA SEBASTIAN, to two-year seats on Defendant Central Committee, which seats they held with integrity and dedication from January, 1993, until ousted therefrom by Defendants as pled below. JOHNSON and WADSWORTH received in the June, 1994, primary election 1,585 and 1,562 votes, respectively and they are informed, believe and recall that they received a substantially similar number of votes in the June, 1992, primary election as well. JOHNSON and WADSWORTH won the June, 1994, primary election despite the best efforts of certain of their colleagues on the Central Committee and other California Republicans, including but not limited to Defendants KNOWLES and CARLSON, who vowed "We've got to get rid of those faggots," and actively worked to do so. (A true and correct copy of relevant portions of the results of the June, 1994, El Dorado primary election is attached hereto as Exhibit C.)

8. Together, Plaintiffs JOHNSON and WADSWORTH own and reside at the premises known as The Lone Antler Ranch (Ranch), located in El Dorado County. Plaintiffs occasionally rent portions of the Ranch to persons or groups for receptions, fundraising and other legitimate purposes for profit, without discriminating therein as required by applicable California law. Proceeds from Ranch rentals are used, in part, to defray the cost of medical treatment for WADSWORTH, who is a disabled Vietnam-era Marine Corps veteran suffering from AIDS.

9. On August 25, 1994, Plaintiff JOHNSON executed a written lease contract with the Katie Hirning For Congress Campaign for a September 17, 1994, fundraiser for Ms. Hirning, the Democratic candidate for the November, 1994, 4th Congressional District election, in which she opposed incumbent Republican Congressman John Doolittle. Pursuant to governing provisions of Defendant Central Committee's bylaws and of the CEC, the contract specifically provided that the names of neither JOHNSON nor WADSWORTH would appear thereon. The consideration for the contract was $100, the fundraiser was held as scheduled and neither JOHNSON nor WADSWORTH took part therein except as lessors of the Ranch.

10. On September 5, 1994, one week before the regularly scheduled meeting of Defendant Central Committee, Plaintiffs JOHNSON and WADSWORTH learned that JOHNSON's father had died in Ohio that day. Both Plaintiffs immediately made plans to travel to Ohio to attend the funeral and advised Defendants SCHUMACHER and LAVETA STELZMILLER thereof by telephone and FAX that same day, noting it was possible each would not be able to attend the September 12, 1994, meeting, to which no Defendant responded. WADSWORTH did not travel to

Ohio due to his need to receive regularly scheduled experimental medical AIDS treatment at Marshall Hospital. Such treatments are lengthy, painful and leave the patient feeling weak and nauseous for several days after administered.

11. Plaintiff WADSWORTH underwent such treatment beginning at 11:00 am on September 12, 1994, and appeared at the meeting of Defendant Central Committee at 7:30 p.m. that same day. The meeting was called to order by Defendant TITUS and proceeded with its business, including the election of Defendant BECKER to the Central Committee, until WADSWORTH began to feel ill. WADSWORTH then gave the Central Committee a check in the amount of $69.75, representing the closing balance from his reelection campaign committee, Riff Raff Republicans PAC, pursuant to operative provisions of the CEC and left. Prior to that point in the meeting, neither its notice, agenda nor any discussion once underway gave WADSWORTH any sign that any action was to be taken against him.

12. Thereafter, under the direction of Defendant TITUS, Defendant Central Committee purported to go into "Executive Session," despite any provision therefor in the governing bylaws of the Central Committee or the CEC, where Defendant EMIGH initiated discussion of Plaintiffs JOHNSON's and WADSWORTH's role in the Hirning fundraiser held at the Ranch and moved that each be removed from the Central Committee for allegedly failing to support Republican candidates and for providing support to Democratic candidates. After discussion supporting the motion from Defendants CARLSON and BECKER, the motion was passed as follows:

. AYES: 13 (BAILEY, BECKER, BORBA, CARLSON, CHRISMAN, DELLINGER, EMIGH, FRENN,

GRIBKOFF, HANLEY, L. STELZMILLER, J. STELZMILLER & TITUS; CHARDI, alternate)

NAYS: 1 (Gilmore) ABSTENTIONS: 3 (Aguiar, Collens & Messenger)

Plaintiffs are informed, believe and allege thereon that Defendant KNOWLES instructed, prevailed upon or otherwise influenced Defendants BECKER and LAVETA STELZMILLER to vote for Plaintiffs' ouster.

13. Defendant Central Committee never informed either Plaintiff of its action in removing them; they learned of it through at least two articles in the local press, which quoted Defendant TITUS as stating both Plaintiffs were "unanimously ousted." While WADSWORTH vowed to continue as a Republican and, in January, 1995, to take his seat on the Central Committee he had won in the June, 1994, primary, JOHNSON resigned his longstanding Republican party membership in disgust and re-registered as a Democrat.

14. Plaintiffs are informed and believe, and allege thereon, that on or between December 31, 1994, and January 3, 1995, Defendant LAVETA STELZMILLER mailed notice to members of Defendant Central Committee of its January 9, 1995, Organizational Meeting. Enclosed in that notice was a proposed resolution urging the dismissal of Doug Wheeler as Secretary of the California State Resources Agency, but no agenda or any other document relating to matters to be considered at the January 9, 1995, meeting. At the Organizational Meeting, Plaintiff WADSWORTH was sworn into his elected office as member for Supervisorial District III of the Central Committee and Defendants TITUS, SCHUMACHER, BECKER and

GRIBKOFF were elected Chairman, Vice-Chairman, Secretary and Treasurer, respectively. While it is, and has been, customary for those elected officials, including, but not limited to Defendant KNOWLES and Congressman John Doolittle, who have the right to appoint members to the Central Committee under CEC §§7250-7470 to do so at this Organizational Meeting, neither Defendant KNOWLES nor Congressman Doolittle then did so.

14. At the January 9, 1995, meeting, an Organizational Agenda given to those present listed "Adoption of By-laws" as item III, but a copy of the proposed bylaws was not included with the notice. Although Plaintiff WADSWORTH objected to the consideration of these proposed bylaws as out of order, because of this lack of adequate notice, Defendant TITUS ruled his objection out-of-order and Defendant SCHUMACHER's motion to adopt the bylaws was seconded by Defendant CARLSON and approved. A true and correct copy of the new bylaws adopted by Defendant Central Committee on January 9, 1995, is attached hereto as Exhibit A.

15. Plaintiff WADSWORTH is informed and believes, and alleges thereon, that Defendant TITUS had directed Defendant BECKER to draft these new bylaws in advance of the January 9, 1995, meeting and that other Defendants hereto, including, but not limited to Defendants EMIGH and KNOWLES, but not including WADSWORTH, knew that the new bylaws would be so drafted and presented for adoption on January 9, 1995. Defendant EMIGH then stated his intention to seek removal of WADSWORTH at Defendant Central Committee's next meeting, set for February 13, 1995, purportedly under bylaw Article XIX "for engaging in actions injurious to the Committee."

16. On February 6, 1995, Defendant BECKER mailed a notice of the February 13, 1995, meeting to all members of Defendant Central Committee, accompanied by an agenda which listed as item IXA "Disciplinary Action." At the meeting, Defendant EMIGH moved, and Defendant CARLSON seconded, the removal of Plaintiff WADSWORTH "for engaging in actions deemed injurious to" the Central Committee. After discussion of the motion from, among others, Defendants BECKER, CARLSON, and EMIGH and SCHUMACHER, including, but not limited to, alleged statements made and actions taken by WADSWORTH prior to January 9, 1995; statements criticizing the Central Committee allegedly made by WADSWORTH and overheard by Defendant SUSAN EMIGH, wife of Defendant EMIGH, in a restaurant on January 19, 1995, and thereafter memorialized by her in "sworn testimony" not produced at the meeting; a December 15, 1995, letter allegedly sent by Katie Hirning to her "supporters," which letter was neither then shown to WADSWORTH nor seen by him at any time prior or since the meeting; concern that the Central Committee beware of expelling members who rent property to Democrats, in light of SCHUMACHER's regularly renting property jointly owned by him and a registered Democrat to Democrats; and Defendant KNOWLES' admission to SCHUMACHER that his reason for pushing, directly or indirectly through his aide BECKER and other members or appointees to the Central Committee, the removal of WADSWORTH therefrom was due to his "being homosexual," the motion was passed as follows:

AYES: 9 (BECKER, CARLSON, COWELL, DELLINGER, EMIGH, GRIBKOFF, SCHUMACHER, J. STELZMILLER & TITUS)

NAYS: 3 (Colvin, Gilmore & WADSWORTH)

ABSTENTIONS: 1 (CHRISMAN)

Plaintiffs are informed, believe and allege thereon that Defendant KNOWLES instructed, prevailed upon or otherwise influenced Defendant BECKER to vote for Plaintiff's ouster. Thereafter, on March 13, 1995, Defendant LAVETA STELZMILLER and Cecil Ringgenberg were elected to fill the seats of JOHNSON and WADSWORTH by acclamation of those members of the Central Committee then present. Plaintiffs are informed, believe and allege thereon that the Defendants present at this meeting knew that LAVETA STELZMILLER had failed to win enough votes in the June, 1994, primary to be elected to the Central Committee, but elected her to membership despite this knowledge and in direct contravention of the will of the electorate, as shown on Exhibit C hereto.

17. Said Defendants', and each of their, aforesaid acts or omissions towards Plaintiffs JOHNSON and WADSWORTH were intended to cause injury to said Plaintiffs, or, alternatively, were done recklessly or with a knowing, willful, grossly negligent and conscious disregard of the consequences to all Plaintiffs' personal and Constitutional rights and well-being, in an oppressive, malicious, overbearing, despicable, deliberately indifferent and demeaning manner so as to entitle all Plaintiffs to awards of punitive damages against said Defendants, and each of them, in the jury's discretion, according to the legal standards governing the respective causes of action pled herein.

18. As a proximate result of Defendants', and each of their acts or omissions, Plaintiffs JOHNSON and WADSWORTH were damaged generally and specially by suffering physical and severe mental injuries, including, but not limited to, pain, nausea, nervousness, fear, shock,

outrage, anguish, humiliation, embarrassment, alienation, helplessness and despair; and all Plaintiffs were damaged by suffering loss of their electoral rights, all in sums to be proven at trial.

19. In doing the acts and omissions at the times and places aforesaid, Defendants and each of them, conspired among themselves, and/or with others and/or in degrees presently unknown to Plaintiffs, to damage and deprive all Plaintiffs of their personal and Constitutional rights. Said Defendants, and each of them, had knowledge of and agreed to both the means and ends of injuring Plaintiffs, either expressly or tacitly; committed the wrongful acts and/or omissions alleged herein pursuant to such knowledge and agreement and damaged all Plaintiffs thereby.

20. The legal remedy of damages available to Plaintiffs provides them only with partial, not full, relief, since Defendants' conduct towards Plaintiffs JOHNSON and WADSWORTH evidences a continuing and unremitting pattern of abuse and prejudicial discrimination on the basis of their sexual orientation, actual, as exaggerated and/or as perceived. More than a substantial likelihood of future violations of all Plaintiffs' statutory, personal and constitutional rights is shown by Defendants' arbitrary and capricious ouster of WADSWORTH from Defendant Central Committee; Defendants' refusal to seat him thereon ignores the mandate of the electorate and constitutes an active and ongoing violation of their rights as aforesaid. All Plaintiffs will therefore continue to suffer substantial, immediate and irreparable harm in the form of their effective disenfranchisement, which harm can only be ended by an award of mandamus or injunctive relief, which when coupled with damages and declaratory relief, will give full relief to all Plaintiffs.

CLASS ACTION ALLEGATIONS

21. Plaintiffs JOHNSON and WADSWORTH bring this action on behalf of themselves and all persons similarly situated, who together form the class of registered Republican voters in Supervisorial District III of El Dorado County who voted for said Plaintiffs for membership on Defendant Central Committee in the June, 1992 and 1994, primary elections and whose votes were thereafter twice nullified by the acts of Defendants, and each of them, as aforesaid.

22. This case satisfies the requisites of FRCVP 23a as follows:

Numerosity - The class has a membership of between 1,500 and 2,500 persons, as based upon election returns from the June, 1992 and 1994, primaries in which Plaintiffs JOHNSON and WADSWORTH were elected.

Commonality - The damages suffered by both named Plaintiffs and the members of they class they represent stem from the same nucleus of operative facts pled above. Specifically, all members share the prejudice to and dilution and deprivation of their rights as voters effected by Defendants' twice removing both named Plaintiffs from Defendant Central Committee, and all members would benefit by equitable relief restoring Plaintiff WADSWORTH to his elected seat on Defendant Central Committee, by declaring the new bylaws inoperative in whole or in part and by awarding money damages as prayed for.

Typicality - Named Plaintiffs uniquely satisfy this requirement as longstanding registered Republicans who reacted to Defendants' actions in divergent ways that span the range of responses of unnamed class members to

Defendants' acts. Thus, the likelihood that named Plaintiffs possess both the same interest and have suffered the same injury as the unnamed class members is increased, not lessened, by their different reactions to Defendants' acts, which comprise the same events and provide the same basis for legal and equitable relief for all Plaintiffs' claims. Given the conspiracy allegations pled, typicality is also satisfied. Moreover, the allegations clearly show actual injuries to named Plaintiffs and any deficiency in degree between the injuries suffered by named Plaintiffs and those by unnamed Plaintiffs enhances named Plaintiffs' ability to act adequately as class representatives.

Adequacy of representation - That the proposed class is formed of voters who twice elected named Plaintiffs to the positions from which Defendants ousted them is the best indicator they will "fairly and adequately protect the interests of the class." Plaintiffs' counsel is well qualified, as shown by his resume attached hereto as Exhibit B, and as by his kinship in the group discriminated against by Defendants: gay, politically active members of the Republican party.

23. This case is maintainable as a class action under the provisions of FRCVP 23b2 since Defendants have acted in a manner generally affecting the class, making equitable and declaratory relief appropriate to the class as a whole, with such ancillary awards of money damages allowable as deemed just according to proof.

1st CAUSE OF ACTION -
CIVIL RIGHTS (42 USC §1983)
(By All Plaintiffs Against All Defendants)

24. Plaintiffs incorporate as though fully set forth

herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

25. In doing the things heretofore alleged, Defendants, and each of them, knew or should have known that ousting named Plaintiffs from Defendant Central Committee was done without reasonable and probable cause or other justification, in arbitrary and capricious abuse of legitimate legal processes and in violation of clearly and long established rights guaranteed to all Plaintiffs under the I and XIV Amendments to the Constitution of the United States, since named Plaintiffs had twice been elected to the Central Committee by their fellow registered Republicans; since the bylaws drafted by Defendant BECKER and purportedly adopted by the Central Committee on January 9, 1995, both as written and enforced, were overbroad, vague and incapable of Constitutional comprehension; and since the enforcement of those bylaws against Plaintiff WADSWORTH under the provisions of CEC §§7250-7470 and 18540-18700, violated all Plaintiffs' I and XIV Amendment rights without rational connection to any legitimate purpose.

26. In so acting, in conspiring with their co-Defendants to so act and in failing to prevent their co-Defendants from so acting, Defendants, and each of them, willfully, recklessly, deliberately, callously, indifferently and/or grossly negligently deprived all Plaintiffs of their fundamental I Amendment rights of freedom of speech, expression and association, and of their right to participate in the electoral and political process by peaceably assembling and petitioning their government for redress of grievances by twice invalidating Plaintiffs' election of Plaintiffs JOHNSON and WADSWORTH to the Central Committee by ousting them therefrom as aforesaid and thereby stifling political debate in and electoral input to Defendant Central

Committee. Defendants likewise deprived all Plaintiffs of their fundamental XIV Amendment rights against abridgement of their privileges or immunities as citizens of the United States and deprived all Plaintiffs of their protected liberty interests in a republican form of government without due process of law by twice invalidating Plaintiffs' election of Plaintiffs JOHNSON and WADSWORTH to the Central Committee by ousting them therefrom as aforesaid, in violation of their fundamental rights to participate in the electoral process by casting votes and having those votes count and determine who their elected representatives will be, without subsequent invalidation except as done in a manner consistent with due process and rationally related to some legitimate interest.

27. To the extent that Plaintiffs must so plead against Defendant Central Committee, but without in any way admitting any legal requirement that they do so or waiving their challenge to such requisites, the aforesaid acts and omissions of Defendants, and each of them, were performed or suffered to occur under written and unwritten, pervasive and unequally applied customs and policies of the Central Committee which, among others, were directed against homosexuals and their friends and supporters solely by nature of their status, and not by nature of their conduct, and which sought to squelch any difference of opinion or dissent, however raised, from a supposed "official party line," whether arising in, or imposed upon from without, the Central Committee. If not actually instituted by, said customs or policies, among others, were ratified and allowed to continue, fester and multiply by Defendants KNOWLES, CARLSON, EMIGH and TITUS before and after the two ousters complained of herein occurred, as shown by the history of discrimination against both named Plaintiffs and others and by the refusal of Defendant TITUS

to publicize meetings of the Central Committee in advance, as duly, moved, seconded, passed and funded in an earlier meeting of the Central Committee, thereby further insulating the Central Committee from representing its constituents and further institutionalizing such customs and practices.

28. Defendants', and each of their, acts or omissions were done under color of state law, including but not limited to CEC §§7250-7470 and 18540-18700, and the 1995 bylaws adopted pursuant thereto, and of their authority as elected members of Defendant Central Committee and deprived Plaintiffs of the rights guaranteed them under the I and XIV Amendments to the U.S. Constitution without due process and/or equal protection of law and of the substantive rights guaranteed thereunder. As a proximate result of the conduct of said Defendants, and each of them, all Plaintiffs were and remain damaged as aforesaid, and are entitled to recover as alleged herein, including reasonable attorney's fees pursuant to 42 USC §1988 and punitive damages under governing standards of federal law.

2nd CAUSE OF ACTION - VIOLATION OF CALIFORNIA CONSTITUTIONAL RIGHTS
(By All Plaintiffs Against All Defendants)

29. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 28, inclusive, of this Class Action Complaint.

30. By their acts and omissions as aforesaid, Defendants, and each of them, violated all Plaintiffs' rights of freedom of speech and equal protection as guaranteed under Article I, Secs. 2 and 7, of the California Constitution. As a proximate result of said Defendants' conduct, all Plaintiffs were and remain damaged as aforesaid, and are

entitled to recover as alleged herein, including reasonable attorney's fees and punitive damages as allowed by law.

3rd CAUSE OF ACTION - UNRUH CIVIL RIGHTS ACT (CAL. CIVIL CODE §§51-52.1)
(By All Plaintiffs Against All Defendants)

31. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 30, inclusive, of this Class Action Complaint.

32. At all times relevant hereto, Defendant Central Committee was and is a business enterprise engaged in promotion of Republican candidates and political interests in El Dorado County, headquartered at 3181 Cameron Park Blvd., Suite 107, Cameron Park, California, as shown, inter alia, by its raising and disbursing funds, contracting for goods and services, employing and reimbursing persons and companies and by being regulated, both in its membership and in its operations, by the aforesaid provisions of the CEC.

33. Plaintiffs JOHNSON and WADSWORTH are informed and believe, and allege thereon, that the reasons, among others, for the aforesaid unreasonable and wrongful acts of differential treatment, discrimination and deprivation of their protected personal and property rights was their sexual orientation as gay males who legitimately exercised their legal and political freedoms of expression and association on and off Defendant Central Committee according to their own beliefs consistent with the laws of the United States and of California and of the properly adopted bylaws of Central Committee, but not in accord with any actual or purported "party line" imposed or ratified by Defendants herein.

34. As a result of Plaintiffs JOHNSON's and WADSWORTH's exercise of their rights as aforesaid, they were expelled from Defendant Central Committee by Defendants, and each of them, to their own, and all Plaintiffs' damage as to be shown at trial. Defendants' wrongful conduct is continuing since Plaintiff WADSWORTH remains expelled from the Central Committee, despite his clear, elected eligibility for membership thereon, since those voters who elected him thereto have effectively had their votes nullified by the acts and omissions of Defendants, and each of them, and since the new bylaws purportedly adopted on January 9, 1995, remain in force and effect, thereby increasing the likelihood they will be used to deprive others of similar rights on the Central Committee in the future. For these reasons, an award of damages, equitable and declaratory relief is just and proper, as more specifically prayed for herein.

4th CAUSE OF ACTION - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(By All Plaintiffs Against All Defendants)

35. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 34, inclusive, of this Class Action Complaint.

36. As a proximate result of the negligent acts or omissions of Defendants, and each of them, Plaintiffs suffered severe humiliation, embarrassment, chagrin, anger and emotional distress and have been injured in mind and body by suffering headaches, nervousness, sleeplessness, and feelings of personal and political helplessness, alienation, frustration and despair, all to Plaintiffs' damage as aforesaid so that Plaintiffs are entitled to recover as alleged herein.

5th CAUSE OF ACTION - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (By Plaintiffs JOHNSON & WADSWORTH Against All Defendants)

37. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 36, inclusive, of this Class Action Complaint.

38. The acts or omissions of Defendants to this cause of action, and each of them, were intentional, outrageous, despicable, oppressive and malicious and were done in conscious or reckless disregard of Plaintiffs' well-being and personal and political rights for the sole purpose of causing Plaintiffs severe emotional distress. Further, Defendants knew, or should have known, that subjecting a person with AIDS, such as Plaintiff WADSWORTH, to their acts and omissions, would stress and weaken his already compromised state of health and well-being.

39. As a proximate result of these acts or omissions of Defendants, and each of them, Plaintiffs suffered severe humiliation, embarrassment, chagrin, anger and emotional distress and have been injured in mind and body by suffering headaches, nervousness, sleeplessness, and feelings of personal and political helplessness, alienation, frustration and despair, all to Plaintiffs' damage as aforesaid and Plaintiffs are entitled to recover as alleged herein. Further, Plaintiff WADSWORTH's already compromised state of health and well-being due to AIDS was stressed and weakened by Defendants', and each of their, acts or omissions, with the result that his life expectancy has been shortened and his T-cell count has dropped dramatically since September, 1994.

6th CAUSE OF ACTION - INTENTIONAL INTERFERENCE WITH BUSINESS INTEREST (By Plaintiffs JOHNSON & WADSWORTH Against All Defendants)

40. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 39, inclusive, of this Class Action Complaint.

41. At all times relevant hereto, Defendants, and each of them, knew or should have known that Plaintiffs JOHNSON and WADSWORTH rented out portions of the Ranch and used the proceeds therefrom to help defray the expensive costs of WADSWORTH's AIDS treatment and medication. In acting as aforesaid, Defendants to this cause of action, and each of them, intentionally sought to interfere with said Plaintiffs' legitimate business use of their property and with a significant - and literal - means of WADSWORTH's life support.

42. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid.

7th CAUSE OF ACTION - INVASION OF PRIVACY (By Plaintiffs JOHNSON & WADSWORTH Against Defendants KNOWLES, CARLSON & TITUS)

43. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 42, inclusive, of this Class Action Complaint.

44. At all times herein mentioned, Plaintiffs had a reasonable and legitimate right and expectation of privacy and sanctity in their persons and reputations, private and

commercial. By the acts and omissions above described, Defendants to this cause of action, and each of them, invaded that right, without any reasonable or legitimate privilege or justification whatsoever, by casting Plaintiffs in the false light of disloyal Republicans, "moles," "those homosexuals," "faggots" (by which term is implied a promiscuous, ridiculous male homosexual undeserving of respect), or other negative attributes which lessened the respect Plaintiffs had in their community. Defendant TITUS further cast Plaintiffs in the false light of social and/or political outcasts by his false statement that the September 12, 1994, vote to remove them from Defendant Central Committee was "unanimous," when it was, in fact, not.

45. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid. Said Plaintiffs further suffered special damages in the form of lost rental income from the Ranch as a proximate result of Defendants,' and each of their, false statements, and other items of special damage stemming from their loss of standing in their community, as to be shown at trial.

8th CAUSE OF ACTION - DEFAMATION
(By Plaintiffs JOHNSON & WADSWORTH Against Defendants KNOWLES, CARLSON & TITUS)

46. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 - 45, inclusive, of this Class Action Complaint.

47. By their statements, acts and omissions above described, Defendants to this cause of action, and each of them, defamed Plaintiffs, without any reasonable or legitimate privilege or justification whatsoever, by calling

Plaintiffs disloyal Republicans, "moles," "those homosexuals," "faggots" (by which term is implied a promiscuous, ridiculous male homosexual undeserving of respect), or otherwise uttered and/or caused to be printed words causing them to be shunned, derided and eventually ejected negative attributes that lessened the respect Plaintiffs had in their community. Defendant TITUS further defamed by his false statement that the September 12, 1994, vote to remove them from Defendant Central Committee was "unanimous," when it was, in fact, not.

48. Some or all of these defamations were heard by both co-Defendants and non-parties hereto, who understood them to be defamatory as to Plaintiffs JOHNSON and WADSWORTH.

49. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid. Said Plaintiffs further suffered special damages in the form of lost rental income from the Ranch as a proximate result of Defendants,' and each of their, false statements, and other items of special damage stemming from their loss or standing in their community, as to be shown at trial.

9th CAUSE OF ACTION -
DECLARATORY RELIEF (28 USC §2201)
(By All Plaintiffs
Against All Defendants Except KNOWLES)

50. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 49, inclusive, of this Class Action Complaint.

51. An actual controversy has arisen and now exists

between the parties relating to the legal rights of all Plaintiffs and all Defendants in relation to the validity of the new bylaws adopted at the January 9, 1995, meeting of Defendant Central Committee, for which Plaintiffs desire a declaration of rights, including, but not limited to, a finding by this Court that said bylaws are null, void and unenforceable.

52. A declaratory judgment is necessary since Plaintiffs contend that the bylaws are inherently infirm and inconsistent with the U.S. and California Constitutions, as written, adopted and/or applied, and Defendants, and each of them, deny the same.

10th CAUSE OF ACTION -
COMMON LAW FAIR PROCEDURE
(By All Plaintiffs Against All Defendants)

53. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 52, inclusive, of this Class Action Complaint.

54. By virtue of the long-established provisions of the common law, Plaintiffs JOHNSON and WADSWORTH had and have a right to be afforded the benefits of fair procedure, including, but not limited to, the rights of prior and adequate notice and the opportunity to defend themselves and present and examine witnesses and documentary evidence in a fair and neutral hearing, before suffering any deprivation of their associational rights as members of Defendant Central Committee.

54. As a proximate result of Defendants,' and each of their, acts and omissions aforesaid, Plaintiffs were damaged and are entitled to recover as alleged herein.

WHEREFORE Plaintiffs pray for trial by jury and damages as follows:

1. For general damages;
2. For special damages according to proof;
3. For fines, penalties, costs, pre- and post-judgment interest and attorneys fees according to law;
4. For punitive damages against all Defendants, including both statutory and discretionary punitives;
5. For a permanent injunction and/or issuance of a writ of mandamus directing Defendants to reinstate Plaintiff WADSWORTH to Defendant Central Committee;
6. For a declaration of the rights and duties of the parties in relation to the new bylaws adopted January 9, 1995, and for a declaration that said bylaws' are invalid and have been without effect;
6. For such other and further relief as proper.

/s/

LAW OFFICES OF G. MICHAEL GERMAN
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
OCT 22 1997
CLERK

No. 97-503

In The

Supreme Court of the United States

October Term, 1997

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN; and BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

Petitioners,

vs.

DAVID KNOWLES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARJORIE E. MANNING
BOLLING, WALTER & GAWTHROP
8880 Cal Center Drive, Suite 400
Sacramento, California 95826
(916) 369-0777

Counsel of Record for Respondents:

Republican Central Committee of El Dorado County
Steven Bailey
Robert Becker
Ed Borba
Bernard Carlson
Merlin Chardi
Christina Cowell
Charles Chrisman
Dan Dellinger
Tom Emigh
Michael Frenn
Maloa Gribkoff
Kevin Hanley
Tom Schumacher
John Stelzmiller
Laveta Stelzmiller
David Titus

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding except as follows:

1) There is no evidence Susan Emigh ever appeared in this action and her inclusion as a party defendant in the First Amended Complaint was neither sought nor authorized by the District Court;

2) The inclusion of Lauren Cooper, Ray Sebastian and Barbara Sebastian as party plaintiffs in the First Amended Complaint was neither sought nor authorized by the District Court.

This opposition brief is submitted on behalf of the following Respondents: Republican Central Committee of El Dorado County, Steven Bailey, Robert Becker, Ed Borba, Bernard Carlson, Merlin Chardi, Christina Cowell, Charles Chrisman, Dan Dellinger, Tom Emigh, Michael Frenn, Maloa Gribkoff, Kevin Hanley, Tom Schumacher, John Stelzmiller, Laveta Stelzmiller, and David Titus.

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42 U.S.C. § 1983 ..... 2, 4

42 U.S.C. § 1985(3) 13

42 U.S.C. § 1986 13

STATE STATUTES

Cal. Elections Code §§ 7400 *et seq.* 6

Cal. Elections Code § 7440 6

Cal. Elections Code § 7443 7

RULES CITED:

Fed. R. Civ. P. 12(b)(6) 4

INTRODUCTION

The Republican Central Committee of El Dorado County is a local branch of the California Republican Party whose members are chosen by registered Republicans in the County through primary elections. This lawsuit challenges the ouster by the Committee of two of its members for conduct deemed injurious to party interests.[1] Cast in terms of emotional rhetoric and provocative accusations of homosexual discrimination, the Complaint invites the judiciary to reinstate the ousted members, rewrite the bylaws of the Republican Party, pass judgment on its platform, and ultimately delegate to a jury the power to usurp the Committee's decisions concerning internal party management. Dismissal of the federal claims predicated on 42 U.S.C. section 1983 was affirmed on the ground plaintiffs had not pled and could point to no facts suggesting the challenged action was undertaken by or fairly attributable to the state.

The Petition's primary assertion, that the reviewing court employed an unduly restrictive or otherwise improper standard of review, ignores both the language of the decision and the significant distinction between operative facts and legal conclusions. Also misconstrued is settled law pertaining to Section 1983 claims in general and the "state action" analysis employed by the Ninth

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[1] The "conduct" cited in the Complaint encompasses (1) plaintiffs' departures from an "official party line", (2) renting of plaintiffs' property to a Democratic fund raising group, (3) plaintiffs' public criticism of Committee members, (4) plaintiffs' support of Democratic candidates, and (5) the fact of plaintiffs' homosexuality.

Circuit in this case. Finally, Petitioners seek to breathe new life into an argument they abandoned on appeal, namely, that their Section 1985 claim predicated on violation of the Fifteenth Amendment should survive notwithstanding any state action deficiency because a party committee's removal of a homosexual from its ranks is tantamount to depriving Afro-Americans of the right to vote in public elections.

In addition to the foregoing specific impediments, Petitioners' entire analysis is infected by a steadfast refusal to appreciate the constitutional ramifications of governmental interference in the internal workings of associations formed for expressive purposes. Simply put, Petitioners have articulated no theory of recovery which can be reconciled with the Committee's constitutional guarantee of free association, which requires that the courts refrain from playing any role in the resolution of intra-party factionalism.

STATEMENT OF THE CASE

Paul Johnson and Kevin Wadsworth initiated this action by filing their original Complaint in United States District Court, Eastern District of California, on May 8, 1995. Original Complaint, Rsp. App. 1. Included in the pleading were claims for relief alleging violation of civil rights pursuant to 42 U.S.C. sections 1983, 1985(3), and 1986. In essence, plaintiffs asserted they were punished for "stands they took", deprived of the fundamental right to vote (along with "class members" theoretically similarly situated), and afforded disparate treatment as

homosexuals. Resp. App. 1. The Complaint also sought a declaration that the Committee bylaws were vague, overly broad and unconstitutional. *Id.*

Defendants moved to dismiss all of plaintiffs' federal claims on the grounds no basis for state action had been pled, no deprivation of fundamental rights had been identified, and judicial interference in the internal management of the party was impermissible pursuant to controlling authority. The District Court granted the motions, expressed doubt a viable constitutional claim could be pled under these circumstances, but granted leave to amend to attempt to state a viable 1983 claim based on First and/or Fourteenth Amendment violations. Order Granting Motion to Dismiss, Resp. App. 26. The District Court stressed any such amendment should not rely on the fundamental right to vote because interference with an election was not claimed and plaintiffs' ouster was from party office, not public office. *Id.*

Plaintiffs' First Amended Complaint (AX E to Petition) mirrored all the deficiencies in the original pleading, apart from deleting the purported claim under Section 1985(3). Following dismissal for failure to allege conduct under color of state law, plaintiffs appealed to the Ninth Circuit Court of Appeals. As detailed below, Petitioners have misrepresented the nature and scope of the Ninth Circuit Panel's review.

A. The Petition misconstrues the standard of review employed by the Ninth Circuit.

Petitioners claim the Panel failed to mention, and therefore must have ignored, the following requirements of *de novo* review: (1) to draw reasonable inferences in favor of the pleader, (2) to scrutinize civil rights pleadings with "special care", and (3) to allow a "novel legal theory" to develop factually. Petition (Pet.), at pp. 8-9. The text of the decision reveals otherwise. It expressly states that all allegations of material fact must be construed in the light most favorable to the plaintiffs. Pet., AX A-5. It also acknowledges dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is improper "unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim". *Id.* The Petition's assertion a different standard applies here is disingenuous. *Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716 (6th Cir. 1996), cited for the proposition civil rights pleadings must be "scrutinized, with special care", employed precisely the same standard of review as that enunciated by the Panel in this case. *Id.*, at p. 724.

Equally unavailing is the Petition's implication the review undertaken by the Panel was unduly restrictive. Pet., at p. 9. The language quoted from this Court's decision in *Felder v. Casey*, 487 U.S. 131, 139 (1988) is of no assistance to Petitioners. That Section 1983 provides a "uniquely federal remedy" against incursions upon federal constitutional rights and should be accorded "a sweep as broad as its language" is not disputed. But the "sweep" of the statute is expressly limited to incursions "under color of law". 42 U.S.C. § 1983. It is Petitioners,

not Respondents or the Ninth Circuit, who choose to ignore that federal mandate.[2]

The Petition stops short of defining the "novel legal theory" which the Ninth Circuit supposedly failed to realize "can best be assessed after factual development". Pet., at p. 9. This omission is telling. The proposition that party central committees are arms of government for "state action" purposes is not "novel"; it has been raised repeatedly, and in the context presented here, uniformly rejected. *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 825-826 (9th Cir. 1987), *affd., March Fong Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 217 (1989); *Banchy v. The Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990); *Blank v. Heineman*, 771 F.Supp. 1013 (D. Neb. 1991); *Federspiel v. Ohio Republican Party*, 867 F.Supp. 617 (S.D. Ohio 1994); *California Republican Party v. Mercier*, 652 F.Supp. 928 (C.D. Cal. 1986); *Unger v. Superior Court*, 37 Cal.3d 612 (Cal. 1984); *Moore v. Panish*, 32 Cal.3d 535, 545 (Cal. 1982).[3]

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[2] *See, e.g.*, Petition at p. 24, fn.7 ("[t]he public office/private post distinction should not control").

[3] *Baker v. Cuomo*, 58 F.3d 814 (2d Cir. 1995), cited at page 9 of the Petition, is readily distinguishable. *Baker* arose from a *sua sponte* dismissal of a *pro se* litigant's complaint which the defense *conceded* raised issues in an unsettled area of the law. *Id.*, at p. 819.

B. There is no support for the Petition's assertion that the Ninth Circuit ignored facts pled or capable of being pled.

The Petition takes the Ninth Circuit to task for its supposed disregard of "facts pled or capable of being pled". Pet., at p. 9. The rule recognizing liberality in pleading speaks to the degree of factual specificity necessary to state a viable claim, not to the pleader's efforts to enlarge the parameters of viable constitutional claims. Thus the court does not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618 624 (9th Cir. 1981). Nor should it "construe the complaint so liberally as to extend our jurisdiction beyond its constitutional limits". *Id.*, at p. 624. These principles appear to be lost on Petitioners, who have pointed to *no* facts "capable of being pled", and are seemingly unable to distinguish between the pleading of material facts and the assertion of legal conclusions.

The contention that county central committees exist and operate solely by virtue of and in furtherance of the laws of California is neither a statement of *fact* nor an accurate statement of California law. The California Elections Code purports to regulate some aspects of county central committees. CEC §§ 7400 et seq. However, neither the Elections Code nor any other provision of State law suggests central committees or some facsimile thereof would not exist absent statutory authority. Nor does any provision of California law suggest that the function of central committees is to uphold or "further" State law. To the contrary, committees are recognized as having "charge of the party campaign". CEC § 7440. In addition,

they "perform any other duties and services for this political party as seem to be for the benefit of the party." CEC § 7443. Petitioners' liberal use of citations to the California Elections Code merely illustrates statutory regulation of central committees, a reality which is not dispositive of whether Respondents acted under color of state law within the *factual* context of this case. Case law is legion that heavy regulation of private organizations does not transform their conduct into "state action". *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974).[4]

Petitioners' next example of a supposedly "ignored" material fact is the allegation Johnson and Wadsworth leased their ranch to a Democratic candidate for a fund raiser, whereas one other defendant engaged in the same practice without suffering the same consequences. Pet., at p. 10. The quoted excerpt from the Complaint is not material to the issue of whether the Committee acted under color of law in removing Johnson and Wadsworth from party management. While it is unquestionably Petitioners' goal to entice this Court into the substantive merits of their political grievance by implying one stated ground for ouster was a pretext for discrimination, the fact remains the Panel did not "reach the Defendants' alternative argument that the Plaintiffs also failed to allege violations of their First and Fourteenth Amendment rights." Pet., AX A-14.

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[4] *See also, San Francisco County Democratic Central Committee v. Eu*, 826 F.2d at p. 825: "Even if the California Elections Code had expressly characterized the committees as public agencies, we would reject the State's premise that a state can strip a voluntary political association of First Amendment rights by legislating it into an arm of the State."

The third string of alleged facts purportedly overlooked by the Panel consists of the following: (1) that Assemblyman Knowles maintained his "local legislative office" in the same suite as that which the Committee occupied, (2) that Knowles displayed campaign materials on his behalf on Committee premises in violation of State law, (3) that among those voting for Johnson's and Wadsworth's ouster were Knowles' former legislative aide and appointee, and (4) that Knowles urged Petitioners' ouster "on the official time and expense of the California State Assembly". Pet., p. 11. Apart from the fact there is no evidence the Panel ignored these allegations, they are not dispositive of the state action issue at hand. The contrary argument, which will be addressed in further detail below, rests on the erroneous assumption that *status* as a state official is co-extensive with *conduct* under color of law.

C. The Petition misconstrues the state action analysis employed by the Ninth Circuit.

The Petition accuses the Panel of "interpreting the four state action tests narrowly instead of broadly in this civil rights case, per *Felder v. Casey, supra.*" Pet., at p. 20. First, *Felder* does not address the four state action tests, much less dictate their broad application. Second, this Court has long held that "careful adherence to the state action requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Third, the text of the decision here shows the Panel employed an appropriate construction of state

action pleading. It affirmed only after determining that "Plaintiffs have failed to show that the Defendants acted under color of state law *and failed to point to any way that such action can be shown*". Pet., AX A-6; emphasis added. In assessing the *nature* of the Assemblyman's alleged wrongful conduct, the court below observed that "even as a public official," Knowles' conduct cannot be deemed under color of state law "unless it is some way related to the performance of his duties as a public official." Pet., AX A-6. It concluded the key determination was whether "Knowles' actions related to the duties and powers of his position as an Assemblyman or instead related to his role as a member of the Republican Party." *Id.*, at pp. A-6-A-7. This language does not reflect a *narrow* interpretation of state action pleading.

Despite its contrary assertion, the Petition fails to identify *any* nexus between Knowles' official duties and the conduct which purportedly contributed to Johnson's and Wadsworth's ouster. Instead, page after page of the Petition is devoted to glorifying to the point of mythical proportions the power and potential influence of a California assemblyman, a characterization no more or less applicable to any public official, and one which does not address *conduct* in any event. Indeed, if Petitioners' legal theories were taken at face value, it would be impossible for any elected public official to function in a private capacity as a member of his or her party.

While Petitioners make much of the contention Knowles' party politicking occurred on the "official time" of the Assembly and that he utilized office space in the same building employed for Committee meetings, these "facts" in no way compromise the Panel's analysis. That

conduct occurs on state premises or during the work hours of a state employee is not sufficient to render it state action. *Polk County v. Dodson* 454 U.S. 312 321 (1981); *Delcambre v. Delcambre* 635 F.2d 407 (5th Cir. 1981); *Murphy v. Chicago Transit Authority* 638 F.Supp. 464 468 (N.D. Ill. 1986). For this reason alone, the contention the "joint action test" was satisfied by "Petitioners' allegations of how Assemblyman Knowles caused their removal" is seriously misguided. Pet., at p. 25.

The Petition also accuses the Panel of misreading *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149 (1978), which supposedly interpreted the public function doctrine as embracing elections *other* than those which produce the uncontested choice of public officials. Pet., p. 20. It is Petitioners who misconstrue *Flagg*. The decision states without equivocation that the public function doctrine applies only if the election in question will produce "the uncontested choice of public officials". *Id.*, at p. 158. The Panel correctly concluded that because the election referred to in the Complaint at bar produced *party officials,* not *public officials,* the doctrine would not apply even if interference with an election had been alleged, which is not the case.[5]

No contrary authority is to be found in *Terry v. Adams,* 345 U.S. 461 (1953). First, *Terry* addressed the refusal of a political party to allow African-Americans to vote in primary elections which routinely produced the nominee for the subsequent general election. Second,

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[5] Petitioners concede Respondents did not violate their constitutional rights "by conducting an election in an unconstitutional manner". Pet., at p. 24, fn.7.

county officials participated in the primary. Third, the case was decided on Fifteenth Amendment grounds, thereby arguably implicating a prohibition against private discrimination in elections. Fourth, even under those circumstances, the dissent concluded the conduct in question was neither under color of state law nor unlawful. Finally, *Terry* drew on the rationale of *Smith v. Allwright*, 321 U.S. 649 (1943), which held that when the privilege of membership in the party is also an essential qualification for voting in a primary to select nominees *for the general election*, the state cannot deny African-Americans the right to vote on the ground they are not members of the party. *Id.*, at p. 664. No such considerations are present here.

With respect to the "state compulsion test", the Petition concludes the Panel erred in failing to recognize state action was present pursuant to the rationale of *Adickes v. Kress*, 398 U.S. 144 (1970). Pet., at p. 25. As the Ninth Circuit correctly observed, state action may exist under the compulsion test where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor's] choice must in law be deemed to be that of the State." *Blum v. Yartesky*, 457 U.S. 991, 1004 (1982). Pet., AX A-11. *Adickes* fits squarely within that scenario. It arose from the arrest of a Caucasian teacher who sought service in a segregated public restaurant while accompanied by African-American students. Her Section 1983 action against Kress (the department store in which the restaurant was located) alleged not only a custom in the community to segregate races, but also a conspiracy between the store and the police which resulted in her arrest. *Id.*, at p. 147.

It is not difficult to discern why the Ninth Circuit decided *Adickes* "simply bears no similarity to the present case." Pet., at p. 25. Petitioners' contrary analysis is at best tortured. Faced with the inescapable conclusion that no provision of the California Elections Code compels or encourages removal of committee members on the basis of sexual orientation, the Petition concludes the enactment must have "set the basis for an uncodified practice or custom of removing committee members on the basis of homosexuality." *Id.* Conspicuously absent is any explanation of how a statute which contains no mention of sexual orientation or discrimination can form the foundation for an "uncodified practice" of discrimination on the basis of homosexuality. This is not surprising; the premise advanced is patently illogical.

Finally, in attempting to analogize this case to the "nexus" test exemplified by *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Petition asserts Knowles used the prestige of his office to insinuate himself into a position of interdependence with the Committee. Pet., at p. 26. But the point is not whether Knowles and the Committee are interdependent, but rather, whether the Committee and the *State* are interdependent. The hallmark of the symbiotic relationship between the state and private actors which occasionally satisfies the state action requirement is the rendering of mutual benefits. In *Burton*, owners of a restaurant which leased space in an automobile parking building owned by the state, refused to serve African-Americans. Crucial to the finding of state action was the conclusion "that the state had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the

enterprise." *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 357-358. Here, absent any factual allegation suggesting Knowles acted on behalf of the State or otherwise exercised his official duties in urging Johnson's and Wadsworth's ouster, the claimed nexus between the State and the Committee is wholly illusory.

Petitioners know this. Their last-ditch attempt to invoke the *Burton* rationale is found in the allegation that membership on a central committee is a *de facto* prerequisite to elected office at all levels of government. Pet., at p. 26. But what the Petition attempts to characterize as a material fact reflecting "political reality" is actually a legal conclusion which not only dismisses the right of public officials to function within their party of choice, but also ignores the fact that "[u]nlike the sovereign, party central committees are expected to serve party interests, not the interest of the public at large." *San Francisco County Democratic Central Committee v. Eu, supra,* 826 F.2d at p. 826, fn.20.

D. The Petition fails to disclose that Plaintiffs waived their right to challenge the District Court's disposition of any purported claim under 42 U.S.C. sections 1985(3) and 1986.

Included in Petitioners' Statement of the Case is the bold misrepresentation that "[u]naddressed by the Panel was the question timely preserved and presented of whether homosexuals are a protected class for purposes of Petitioners' 42 U.S.C. §§ 1985(3) and 1986 claims". Pet., at p. 7. Petitioners' opening brief to the Ninth Circuit was devoid of *any* challenge to the District Court's dismissal

of their Section 1985 and 1986 claims. Resp. App. 42. The right to claim relief under these sections was abandoned. *Officers for Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725-726 (9th Cir. 1992). This impediment could not have escaped Petitioners' notice, as it was brought to the Ninth Circuit's attention in Respondents' brief on appeal. Resp. App. 94, fn.2. To suggest the Ninth Circuit simply ignored claims which instead were abandoned is unconscionable.

E. In attacking the Panel's decision, the Petition consistently and erroneously equates status as a public official with conduct under color of law.

One acts under color of state law when exercising power made possible only because the wrongdoer is clothed with the authority of state law. *West v. Atkins*, 487 U.S. 42, 49 (1988). Thus the pivotal question faced by the Panel was not Knowles' status as a member of the Assembly, but rather, evidence of facts establishing the requisite causal link between his State-created *official* duties and the conduct which created the alleged deprivation of constitutional rights. *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991). The Petition takes great pains to avoid this issue, opting instead to focus on subtle distinctions between various provisions of the California Elections Code which the Panel purportedly misunderstood. Pet., at pp. 11-16. To the extent this exposition is intelligible, it is often contradictory and at best irrelevant.

In arguing the Ninth Circuit "downplayed" Knowles' position and power (which is not the issue anyway),

Petitioners first assert the Panel erred in finding his "*ex officio* membership on the Committee derives from Knowles' position as the Republican nominee for the Assembly, not from his status as a California assemblyman." Pet., at p. 11. Yet the Petition concedes Knowles "obtained his position as a nominee". Pet., at p. 12, fn.2. That he "could not have kept it if a write-in Republican had been elected to the Assembly instead of him" is completely irrelevant. *Id.* The point is that Knowles' membership on the Committee derives from his status as a Republican. Petitioners' contention the Panel should have accepted as true and controlling the "material allegation" that Knowles' status on the Committee existed solely by virtue of his status as an assemblyman is not a material allegation at all. It is merely one of many attempts to obscure the fact this Complaint says nothing about effecting constitutional deprivation *through the exercise of Knowles' official duties as a member of the Assembly*. In tacit admission of that problem, the Petition returns to the familiar refrain that "Knowles' greater power for influence and its misuse was possible only because his Assembly seat gave him power undiminished by Committee discretion and a Committee seat less subject to loss." Pet., at p. 14. Its other deficiencies aside, the quoted sentence does not even attempt to establish a connection between the exercise of *official* power as an agent of government and Petitioners' ouster from the Committee.

Similarly misguided is the Petition's criticism of the Panel for ignoring the District Court decision in *Anthony v. County of Sacramento*, 845 F.Supp. 1396 (E.D. Cal. 1994), while "stretching across circuit lines" to find *Murphy v. Chicago Transit Authority, supra*, 638 F.Supp. 464. Pet., at p.

14. It is obviously the result reached in *Anthony* which Petitioners find appealing, not the test employed. The fact the complaint in *Anthony* depicted a work environment made racially and sexually hostile by supervisory individuals acting under color of law is of no assistance to Petitioners in the factual context of this case. *Id.*, at p. 1401. And the test employed in *Anthony* is no different from that enunciated by the Panel in this case:

> Action under color of law is always identified by reference to the relationship between defendant's alleged misconduct and his state-created duties and powers, rather than the status of the parties. *Id.*, at p. 1401.[6]

REASONS FOR DENYING THE PETITION

A. Contrary to the Petition's assertion, no recurring issue of national and exceptional importance is presented by this case.

Petitioners seek *certiorari* "on the grounds that recurring issues of national and exceptional importance relating to the fundamental right to vote remain unresolved in this case." Pet., at pp. 7-8. Neither the Complaint nor the Amended Complaint alleges that anyone involved in this case was deprived of the right to vote. It is not claimed

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[6] The test enunciated in *Murphy v. Chicago Transit Authority, supra*, is not materially different either: " . . . A person acts 'under color of state law' when he engages in conduct that is related to state authority conferred on the person, even though that authority does not in fact permit the conduct." 638 F.Supp. at pp. 467-468.

that any individual or group of individuals was denied access to the polls, that anyone's vote was not counted, or that the elections in question were otherwise conducted improperly. Indeed, Petitioners have conceded they were duly elected in properly conducted proceedings. The essence of their grievance is the Committee's subsequent decision to oust them for conduct deemed injurious to the party. Whether the injury perceived by Respondents consisted of Petitioners' departure from an official party line, public criticism of Respondents, support for Democratic candidates, derogation of Republican candidates, or Johnson's and Wadsworth's status as homosexuals is irrelevant. The ouster was post-election conduct, not interference with an election.

Furthermore, the Petition points to no decision which has found a fundamental right to vote in any context other than elections for public office. The factual distinctions between the case at bar and the "White primary cases" was addressed above. To date, no case has expanded the rationale of *Terry v. Adams* or *Smith v. Allwright* outside the context of a race-based ban on voting, and here no registered Republican was denied the right to vote at all, much less for discriminatory reasons.

B. The internal management decisions of political parties cannot be subjected to judicial review under the guise of civil rights litigation.

While there is no doubt that the right of political parties to govern their internal affairs without state interference involves an issue of significant national importance, it was resolved long ago. In *Cousins v. Wigoda*, 9

U.S. 477 (1975), this Court held that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Id.*, at p. 488. *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981) recognized the freedom identified in *Cousins* necessarily presupposes that the courts may not interfere in the Party's internal management on the ground they view "a particular expression as unwise or irrational". *Id.*, at pp. 123-124. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Storer v. Brown*, 415 U.S. 724 (1974), this Court upheld state laws designed to preserve the integrity of political parties by preventing "raiding". While Petitioners relied heavily on the latter two cases in their arguments to the Ninth Circuit, they have never acknowledged the import of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which mandates that the rationale of *Rosario* and *Storer* applies only to potential disruption of political parties from *without*, and cannot be invoked to prevent parties from taking internal steps to govern their associations from *within*. *Id.*, at pp. 223-224.

These authorities teach that any construction of the state action requirement which equates internal management of political parties with the official action of government is constitutionally flawed. Since the purpose of the state action requirement is to preserve individual freedom, and freedom of political association is at the heart of the First Amendment, no result other than that reached by the Panel could be tolerated under the Constitution. *See, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 132 L.Ed.2d 487, 504 (1995).

CONCLUSION

For the reasons and pursuant to the authorities set forth hereinabove, Respondents respectfully submit the Petition should be denied.

Dated: October 22, 1997

Respectfully submitted,

MARJORIE E. MANNING
BOLLING, WALTER & GAWTHROP
8880 Cal Center Drive, Suite 400
Sacramento, California 95826
(916) 369-0777

Counsel of Record for Respondents
Republican Central Committee
of El Dorado County
Steven Bailey
Robert Becker
Ed Borba
Bernard Carlson
Merlin Chardi
Christina Cowell
Charles Chrisman
Dan Dellinger
Tom Emigh
Michael Frenn
Maloa Gribkoff
Kevin Hanley
Tom Schumacher
John Stelzmiller
Laveta Stelzmiller
David Titus

LAW OFFICES OF
G. MICHAEL GERMAN – 103312
A Professional Corporation
444 Market St. – Suite 930
San Francisco, CA 94111
Telephone (415) 433-4500

Attorney for Plaintiffs
PAUL JOHNSON, KEVIN WADSWORTH,
individually and on behalf of
all others similarly situated.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAUL JOHNSON, KEVIN WADSWORTH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL CMMITTEE [sic] OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS and DOES 1-25, inclusive,

Defendants.
_____/

CIV-S-95-835 MLS PAN
No. CV5-95-

CLASS ACTION COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND EQUITABLE RELIEF

[CIVIL RIGHTS (42 USC §§1983 & 1985(3)); UNRUH ACT (CAL. CIVIL CODE §§51-52.1; NEGLIGENT & INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; INTERFERENCE WITH BUSINESS; INVASION OF PRIVACY; DEFAMATION; & COMMON LAW FAIR PROCEDURE]

JURY TRIAL DEMANDED

INTRODUCTORY ALLEGATIONS

(Filed May 8, 1995)

1. Jurisdiction herein is based on 28 USC §§1331, 1343, 1357, 1367 2201 and venue is proper in this district because all Defendants, named and unnamed, reside herein.

2. At all times herein mentioned, Defendant REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY (Central Committee) was and is a political organization subject to the laws of this State and of the United States, organized, existing and operating under and in furtherance of the laws of this State, including, but not limited to, Cal. Elections Code (CEC) §§7250-7470 and 18540-18700, whose chairman is Defendant DAVID TITUS.

3. Plaintiffs are informed and believe, and allege thereon, that at all times herein mentioned, Defendants STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER and DAVID TITUS were and/or are duly elected, alternate or appointed members of Defendant Central Committee and were acting under and in furtherance of the laws of this State, including, but not limited to, CEC §§7250-7470 and 18540-18700. Plaintiffs are similarly informed and believe that Defendant DAVID KNOWLES is an elected Republican member of the California Assembly for the 4th Assembly District who employs Defendant BECKER as

his legislative aide. Said Defendants are sued individually, without prejudice to Plaintiffs' right to recover and/or satisfy judgment against them or any other defendant in any other capacity.

4. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 25, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will amend this complain to allege such Defendants' true names and capacities when ascertained. Plaintiffs are informed and believe, and allege thereon, that each such Defendant resides in this district, is responsible in some manner for the occurrences herein alleged and that Plaintiffs' damages were proximately caused by their conduct, acts and/or omissions.

5. Plaintiffs are informed and believe, and allege thereon, that named and DOE Defendants are, and at all times herein mentioned were, the agents and co-conspirators of their co-defendants, and in doing the things alleged herein were acting within the course and scope of such agency and conspiracy and with the supervision, permission, instruction and consent, express or implied, of said co-defendants.

6. From September, 1978, and at all times since, Plaintiffs PAUL JOHNSON and KEVIN WADSWORTH have been, and have held themselves out to third parties as, exclusive life partners in a loving relationship; have shared living expenses, space and resources; have exchanged religious vows of commitment to each other; have traveled and vacationed together; and, more recently, have filed income tax returns consistent with

their relationship and have made provisions by testamentary disposition to care for the other in the event either is incapacitated. Each is sole heir to the estate of the other, an estate held in joint tenancy.

7. Plaintiffs JOHNSON and WADSWORTH had or have been longtime (10+ years), members of the California Republican party, registered to vote thereunder and previously serving with distinction on other Central Committees in this state, and were, in 1992 and 1994, elected and reelected by their fellow Republicans of El Dorado County, Supervisorial District III, to two-year seats on Defendant Central Committee, which seats they held with integrity and dedication from January, 1993, until ousted therefrom by Defendants as pled below. JOHNSON and WADSWORTH received in the June, 1994, primary election 1,585 and 1,562 votes, respectively and they are informed, believe and recall that they received a substantially similar number of votes in the June, 1992, primary election as well. JOHNSON and WADSWORTH won the June, 1994, primary election despite the best efforts of certain of their colleagues on the Central Committee and other California Republicans, including but not limited to Defendants KNOWLES and CARLSON, who vowed "We've got to get rid of those faggots," and actively worked to do so.

8. Together, Plaintiffs JOHNSON and WADSWORTH own and reside at the premises known as The Lone Antler Ranch (Ranch), located in El Dorado County. Plaintiffs occasionally rent portions of the Ranch to persons or groups for receptions, fundraising and other legitimate purposes for profit, without discrimination therein as required by applicable California law. Proceeds

from Ranch rentals are used, in part, to defray the cost of medical treatment for WADSWORTH, who is a disabled Vietnam-era Marine Corps veteran suffering from AIDS.

9. On August 25, 1994, Plaintiff JOHNSON executed a written lease contract with the Katie Hirning For Congress Campaign for a September 17, 1994, fundraiser for Ms. Hirning, the Democratic candidate for the November, 1994, 4th Congressional District election, in which she opposed incumbent Republican Congressman John Doolittle. Pursuant to governing provisions of Defendant Central Committee's bylaws and of the CEC, the contract specifically provided that the names of neither JOHNSON nor WADSWORTH would appear thereon. The consideration for the contract was $100, the fundraiser was held as scheduled and neither JOHNSON nor WADSWORTH took part therein except as lessors of the Ranch.

10. On September 5, 1994, one week before the regularly scheduled meeting of Defendant Central Committee, Plaintiffs JOHNSON and WADSWORTH learned that JOHNSON'S father had died in Ohio that day. Both Plaintiffs immediately made plans to travel to Ohio to attend the funeral and advised Defendants SCHUMACHER and LAVETA STELZMILLER thereof by telephone and FAX that same day, noting it was possible each would not be able to attend the September 12, 1994, meeting, to which no Defendant responded. WADSWORTH did not travel to Ohio due to his need to receive regularly scheduled experimental medical AIDS treatment at Marshall Hospital. Such treatments are lengthy, painful and leave the patient feeling weak and nauseous for several days after administered.

11. Plaintiff WADSWORTH underwent such treatment beginning at 11:00 am on September 12, 1994, and appeared at the meeting of Defendant Central Committee at 7:30 p.m. that same day. The meeting was called to order by Defendant TITUS and proceeded with its business, including the election of Defendant BECKER to the Central Committee, until WADSWORTH began to feel ill. WADSWORTH then gave the Central Committee a check in the amount of $69.75 representing the closing balance from his reelection campaign committee, Riff Raff Republicans PAC, pursuant toe operative provisions of the CEC and left. Prior to that point in the meeting, neither its notice, agenda nor any discussion once underway gave WADSWORTH any sign that any action was to be taken against him.

12. Thereafter, under the direction of Defendant TITUS, Defendant Central Committee purported to go into "Executive Session,"despite any provision therefor in the governing bylaws of the Central Committee or the CEC, where Defendant EMIGH initiated discussion of Plaintiffs JOHNSON'S and WADSWORTH'S role in the Hirning fundraiser held at the Ranch and moved that each be removed from the Central Committee for allegedly failing to support Republican candidates and for providing support to Democratic candidates. After discussion supporting the motion from Defendants CARLSON and BECKER, the motion was passed as follows:

AYES: 13 (BAILEY, BECKER, BORBA, CARLSON, CHRISMAN, DELLINGER, EMIGH, FRENN, GRIBKOFF, HANLEY, L. STELZMILLER, J. STELZMILLER & TITUS; CHARDI, alternate)

NAYS: (Gilmore) ABSTENTIONS: 3 (Aguiar, Collens & Messenger)

13. Defendant Central Committee never informed either Plaintiff of its action in removing them; they learned of it through at least two articles in the local press, which quoted Defendant TITUS as stating both Plaintiffs were"unanimously ousted." While WADSWORTH vowed to continue as a Republican and, in January, 1995, to take his seat on the Central Committee he had won in the June, 1994, primary, JOHNSON resigned his longstanding Republican party membership in disgust and reregistered as a Democrat.

14. Plaintiffs are informed and believe, and allege thereon, that on or between December 31, 1994, and January 3, 1995, Defendant LAVETA STELZMILLER mailed notice to members of Defendant Central Committee of its January 9, 1995, Organizational Meeting. Enclosed in that notice was a proposed resolution urging the dismissal of Doug Wheeler as Secretary of the California State Resources Agency, but no agenda or any other document relating to matters to be considered at the January 9, 1995, meeting. At the Organizational Meeting, Plaintiff WADSWORTH was sworn into his elected office as member for Supervisorial District III of the Central Committee and Defendants TITUS, SCHUMACHER, BECKER and GRIBKOFF were elected Chairman, Vice-Chairman, Secretary and Treasurer, respectively. While it is, and has been, customary for those elected officials, including, but not limited to Defendant KNOWELES and Congressman John Doolittle, who have the right to appoint members to the Central Committee under CEC §§7250-7470 to do so

at this Organizational Agenda Meeting, neither Defendant KNOWLES nor Congressman Doolittle then did so.

14. At the January 9, 1995, meeting, an Organizational Agenda given to those present listed "Adoption of By-laws" as item III, but a copy of the proposed bylaws was not included with the notice. Although Plaintiff WADSWORTH objected to the consideration of these proposed bylaws as out of order, because of this lack of adequate notice, Defendant TITUS ruled his objection out-of-order and Defendant SCHUMACHER'S motion to adopt the bylaws was seconded by Defendant CARLSON and approved. A true and correct copy of the new bylaws adopted by Defendant Central Committee on January 9, 1995, is attached hereto as Exhibit A.

15. Plaintiff WADSWORTH is informed and believes, and alleges thereon, that Defendant TITUS had directed Defendant BECKER to draft these new bylaws in advance of the January 9, 1995, meeting and that other Defendants hereto, including, but not limited to Defendants EMIGH and KNOWLES, but not including WADSWORTH, knew that the new bylaws would be so drafted and presented for adoption on January 9, 1995. Defendant EMIGH then stated his intention to seek removal of WADSWORTH at Defendant Central Committee's next meeting, set for February 13, 1995, purportedly under bylaw Article XIX "for engaging in actions injurious to the Committee."

16. On February 6, 1995, Defendant BECKER mailed a notice of the February 13, 1995, meeting to all members of Defendant Central Committee, accompanied by an agenda which listed as item IXA "Disciplinary Action."

At the meeting, Defendant EMIGH moved, and Defendant CARLSON seconded, the removal of Plaintiff WADSWORTH "for engaging in actions deemed injurious to"the Central Committee. After discussion of the motion from, among others, Defendants BECKER, CARLSON, and EMIGH and SCHUMACHER, including, but not limited to, alleged statements made and actions taken by WADSWORTH prior to January 9, 1995; statements criticizing the Central Committee allegedly made by WADSWORTH and overheard by Susan Emigh, wife of Defendant EMIGH, in a restaurant on January 19, 1995; a December 15, 1995, letter allegedly sent by Katie Hirning to her "supporters," which letter was neither then shown to WADSWORTH nor seen by him at any time prior or since the meeting; concern that the Central Committee beware of expelling members who rent property to Democrats, in light of SCHUMACHER's regularly renting property jointly owned by him and a registed Democrat to Democrats; and Defendant KNOWLES' admission to SCHUMACHER that his reason for pushing, directly or indirectly through his aide BECKER and other members or appointees to the Central Committee, the removal of WADSWORTH therefrom was due to his "being homosexual," the motion was passed as follows:

AYES: 9 (BECKER, CARLSON, COWELL, DELLINGER, EMIGH, GRIBKOFF, SCHUMACHER, J. STELZMILLER & TITUS)

NAYS: 3 (Colvin, Gilmore & WADSWORTH) ABSTENTIONS: 1 (CHRISMAN) Thereafter, on March 13, 1995, Defendant LAVETA STELZMILLER and Cecil Riggenberg were elected to fill the seats of JOHNSON and

WADSWORTH by acclamation of those members of the Central Committee then present.

17. Said Defendants', and each of their, aforesaid acts or omissions towards Plaintiffs JOHNSON and WADSWORTH were intended to cause injury to said Plaintiffs, or, alternatively, were done recklessly or with a knowing, willful, grossly negligent and conscious disregard of the consequences to all Plaintiffs' personal and Constitutional rights and well-being, in an oppressive, malicious, overbearing, despicable, deliberately indifferent and demeaning manner so as to entitle all Plaintiffs to awards of punitive damages against said Defendants, and each of them, in the jury's discretion, according to the legal standards governing the respective causes of action pled herein.

18. As a proximate result of Defendants', and each of their acts or omissions, Plaintiffs JOHNSON and WADSWORTH were damaged generally and specially by suffering physical and severe mental injuries, including, but not limited to, pain, nausea, nervousness, fear, shock, outrage, anguish, humiliation, embarrassment, alienation, helplessness and despair; and all Plaintiffs were damaged by suffering loss of their electoral rights, all in sums to be proven at trial.

19. In doing the acts and omissions aforesaid, Defendants and each of them, conspired among themselves, and/or with others and/or in degrees presently unknown to Plaintiffs, to damage and deprive all Plaintiffs of their personal and Constitutional rights. Said Defendants, and each of them, had knowledge of and agreed to both the means and ends of injuring Plaintiffs,

either expressly or tacitly; committed the wrongful acts and/or omissions alleged herein pursuant to such knowledge and agreement and damaged Plaintiffs thereby, all as aforesaid.

20. The legal remedy of damages available to Plaintiffs provides them only with partial, not full, relief, since Defendants' conduct towards Plaintiffs JOHNSON and WADSWORTH evidences a continuing and unremitting pattern of abuse and prejudicial discrimination on the basis of their sexual orientation, actual, as exaggerated and/or as perceived. More than a substantial likelihood of future violations of all Plaintiffs' statutory, personal and constitutional rights is shown by Defendants' arbitrary and capricious ouster of WADSWORTH from Defendant Central Committee; Defendant's refusal to seat him thereon ignores the mandate of the electorate and constitutes an active and ongoing violation of their rights as aforesaid. All Plaintiffs will therefore continue to suffer substantial, immediate and irreparable harm in the form of their effective disenfranchisement, which harm can only be ended by an award of mandamus or injunctive relief, which when coupled with damages and declaratory relief, will give full relief to all Plaintiffs.

CLASS ACTION ALLEGATIONS

21. Plaintiffs JOHNSON and WADSWORTH bring this action on behalf of themselves and all persons similarly situated, who together form the class of registered Republican voters in Supervisorial District III of El Dorado County who voted for said Plaintiffs for membership on Defendant Central Committee in the June, 1992 and

1994, primary elections and whose votes were thereafter twice nullified by the acts of Defendants, and each of them, as aforesaid.

22. This case satisfies the requisites of FRCVP 23a as follows:

Numerosity – The class has a membership of between 1,500 and 2,500 persons, as based upon election returns from the June, 1992 and 1994, primaries in which Plaintiffs JOHNSON and WADSWORTH were elected.

Commonality – The damages suffered by both names Plaintiffs and the members of they [sic] class they represent stem from the same nucleus of operative facts pled above. Specifically, all members share the prejudice to and dilution and deprivation of their rights as voters effected by Defendants' twice removing both names Plaintiffs from Defendant Central Committee, and all members would benefit by equitable relief restoring Plaintiff WADSWORTH to his elected seat on Defendant Central Committee, by declaring the new bylaws inoperative in whole or in part and by awarding money damages as prayed for.

Typicality – Names Plaintiffs uniquely satisfy this requirement as longstanding registered Republicans who reacted to Defendants' actions in divergent ways that span the range of responses of unnamed class members to Defendants' acts. Thus, the likelihood that named Plaintiffs possess both the same interest and have suffered the same injury as the unnamed class members is increased, not lessened, by their different reactions to Defendants' acts, which comprise the same events and provide the same basis for legal and equitable relief for

all Plaintiffs' claims. Given the conspiracy allegations pled, typicality is also satisfied. Moreover, the allegations clearly show actual injuries to named Plaintiffs and any deficiency in degree between the injuries suffered by named Plaintiffs and those by unnamed Plaintiffs enhances named Plaintiffs' ability to act adequately as class representatives.

Adequacy of representation – That the proposed class is formed of voters who twice elected named Plaintiffs to the positions from which Defendants ousted them is the best indicator they will "fairly and adequately protect the interests of the class." Plaintiffs' counsel is well qualified, as shown by his resume attached hereto as Exhibit B, and as by his kinship in the group discriminated against by Defendants: gay, politically active members of the Republican party.

23. This case is maintainable as a class action under the provisions of FRCVP 23b2 since Defendants have acted in a manner generally affecting the class, making equitable and declaratory relief appropriate to the class as a whole, with such ancillary awards of money damages allowable as deemed just according to proof.

1ST CAUSE OF ACTION –
CIVIL RIGHTS (42 USC §1983)
(By All Plaintiffs Against All Defendants)

24. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

25. In doing the things heretofore alleged, Defendants, and each of them, knew or should have known

that ousting named Plaintiffs from Defendant Central Committee was done without reasonable and probable cause or other justification, in arbitrary and capricious abuse of legitimate legal processes and in violation of clearly and long established rights guaranteed to all Plaintiffs under Article I, Section 10 and the I, V, IX, X, XIV and XV Amendments to the Constitution of the United States, since named Plaintiffs had twice been elected to the Central Committee by their fellow registered Republicans; since the bylaws drafted by Defendant BECKER and purportedly adopted by the Central Committee on January 9, 1995, both as written and enforced, were overbroad, vague and incapable of Constitutional comprehension; and since the enforcement of those bylaws against Plaintiff WADSWORTH was invalid as an *ex post facto* act violative of all Plaintiffs' rights.

26. In so acting, and in failing to prevent their co-Defendants from so acting, Defendants, and each of them, willfully, recklessly, deliberately, callously, indifferently and/or grossly negligently deprived Plaintiffs of their substantive civil rights of freedom of expression and association, voting and membership on Defendant Central Committee, freedom from deprivation thereof without due process and from operation of *ex post facto* laws, as guaranteed by Article I, Section 10 and the I, V, IX, X, XIV and XV Amendments to the U.S. Constitution.

27. To the extent that Plaintiffs must so plead against Defendant Central Committee, but without in any way admitting any legal requirement that they do so or waiving their challenge to such requisites, the aforesaid acts and omissions of Defendants, and each of them, were

performed or suffered to occur under written and unwritten, pervasive and unequally applied customs and policies of the Central Committee which, among others, were directed against homosexuals and their friends and supporters solely by nature of their status, and not by nature of their conduct, and which sought to squelch any difference of opinion or dissent, however raised, from a supposed "official party line," whether arising in, or imposed upon from without, the Central Committee. If not actually instituted by, said customs or policies, among others, were ratified and allowed to continue, fester and multiply by Defendants KNOWLES, CARLSON, EMIGH and TITUS before and after the two ousters complained of herein occurred, as shown by the history of discrimination against both named Plaintiffs and others and by the refusal of Defendant TITUS to publicize meetings of the Central Committee in advance, as duly, moved, seconded, passed and funded in an earlier meeting of the Central Committee, thereby further insulating the Central Committee from representing its constituents and further institutionalizing such customs and practices.

28. Defendants', and each of their, acts or omissions were done under color of state law and of their authority as elected members of Defendant Central Committee and deprived Plaintiffs of the rights guaranteed them under Article I, Section 10 and the I, V, IX, X, XIV and XV Amendments to the U.S. Constitution without due process and/or equal protection of law and of the substantive rights guaranteed thereunder. As a proximate result of the conduct of said Defendants, and each of them, all Plaintiffs were and remain damaged as aforesaid, and is entitled to recover as alleged herein, including reasonable

attorney's fees pursuant to 42 USC §1988 and punitive damages under governing standards of federal law.

2nd CAUSE OF ACTION –
CIVIL RIGHTS CONSPIRACY
(42 USC §§1985(3) & 1986)
(By All Plaintiffs Against All Defendants)

29. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 28, inclusive, of this Class Action Complaint.

30. In doing the things heretofore alleged, Defendants, and each of them, actively conspired among themselves for the purpose of depriving Plaintiffs, directly and indirectly, of the equal protection of, and of the equal privileges and immunities of, the aforesaid substantive and procedural rights guaranteed by the U.S. Constitution, and said Defendants acted in furtherance of the object of that conspiracy by injuring Plaintiffs in their persons and property and deprived them from having and exercising the rights and privileges guaranteed citizens of the United States by its statutes and Constitution. Defendants knew or should have known that subjecting Plaintiffs to the aforesaid wrongful and otherwise improper acts, and in conspiring to do so, was done without reasonable and probable cause or other justification and in violation of clearly and long established rights guaranteed under the I, V, IX, X, XIV and XV Amendments to the U.S. Constitution. Further, in knowing that the acts forming such a conspiracy against Plaintiffs were about to be committed and, despite their having the power to prevent them from being committed, neglected or refused to prevent their commission, Defendants, and

each of the, are liable to all Plaintiffs for their aforesaid damages proximately caused thereby.

3rd CAUSE OF ACTION – UNRUE CIVIL RIGHTS ACT (CAL. CIVIL CODE §§51-52.1) (By All Plaintiffs Against All Defendants)

31. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

32. At all times relevant hereto, Defendant Central Committee was and is a business enterprise engaged in promotion of Republican candidates and political interests in El Dorado County, headquartered at 3181 Cameron Park Blvd., Suite 107, Cameron Park, California, as shown, inter alia, by its raising and disbursing funds, contracting for goods and services, employing and reimbursing persons and companies and by being regulated, both in its membership and in its operations, by the aforesaid provisions of the CEC.

33. Plaintiffs JOHNSON and WADSWORTH are informed and believe, and allege thereon, that the reasons, among others, for the aforesaid unreasonable and wrongful acts of differential treatment, discrimination and deprivation of their protected personal and property rights was their sexual orientation as gay males who legitimately exercised their legal and political freedoms of expression and association on and off Defendant Central Committee according to their own beliefs consistent with the laws of the United States and of California and of the properly adopted bylaws of Central Committee,

but not in accord with any actual or purported "party line" imposed or ratified by Defendants herein.

34. As a result of Plaintiffs JOHNSON's and WADSWORTH's exercise of their rights as aforesaid, they were expelled from Defendant Central Committee by Defendants, and each of them, to their own, and all Plaintiffs' damage as to be shown at trial. Defendants' wrongful conduct is continuing since Plaintiff WADSWORTH remains expelled from the Central Committee, despite his clear, elected eligibility for membership thereon, since those voters who elected him thereto have effectively had their votes nullified by the acts and omissions of Defendants, and each of them, and since the new bylaws purportedly adopted on January 9, 1995, remain in force and effect, thereby increasing the likelihood they will be used to deprive others of similar rights on the Central Committee in the future. For these reasons, an award of damages, equitable and declaratory relief is just and proper, as more specifically prayed for herein.

4th CAUSE OF ACTION – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(By All Plaintiffs Against All Defendants)

35. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

36. As a proximate result of the negligent acts or omissions of Defendants, and each of them, Plaintiffs suffered severe humiliation, embarrassment, chagrin, anger and emotional distress and have been injured in mind and body by suffering headaches, nervousness,

sleeplessness, and feelings of personal and political helplessness, alienation, frustration and despair, all to Plaintiffs' damage as aforesaid so that Plaintiffs are entitled to recover as alleged herein.

5th CAUSE OF ACTION – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (By Plaintiffs JOHNSON and WADSWORTH Against All Defendants)

37. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

38. The acts or omissions of Defendants to this cause of action, and each of them, were intentional, outrageous, despicable, oppressive and malicious and were done in conscious or reckless disregard of Plaintiffs' well-being and personal and political rights for the sole purpose of causing Plaintiffs severe emotional distress. Further, Defendants knew, or should have known, that subjecting a person with, AIDS, such as Plaintiff WADSWORTH, to their acts and omissions, would stress and weaken his already compromised state of health and well-being.

39. As a proximate result of these acts or omissions of Defendants, and each of them, Plaintiffs suffered severe humiliation, embarrassment, chagrin, anger and emotional distress and have been injured in mind and body by suffering headaches, nervousness, sleeplessness, and feelings of personal and political helplessness, alienation, frustration and despair, all to Plaintiffs' damage as aforesaid and Plaintiffs are entitled to recover as alleged

herein. Further, Plaintiff WADSWORTH's already compromised state of health and well-being due to AIDS was stressed and weakened by Defendants', and each of their, acts or omissions, with the result that his life expectancy has been shortened and his T-Cell count has dropped dramatically since September, 1994.

6th CAUSE OF ACTION – INTENTIONAL INTERFERENCE WITH BUSINESS INTEREST (By Plaintiffs JOHNSON & WADSWORTH Against All Defendants)

40. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 though 23, inclusive, of this Class Action Complaint.

41. At all times relevant hereto, Defendants, and each of them, knew or should have known that Plaintiffs JOHNSON and WADSWORTH rented out portions of the Ranch and used the proceeds therefrom to help defray the expensive costs of WADSWORTH's AIDS treatment and medication. In acting as aforesaid, Defendants to this cause of action, and each of them, intentionally sought to interfere with said Plaintiffs' legitimate business use of their property and with a significant – and literal – means of WADSWORTH's life support.

42. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid.

7th CAUSE OF ACTION – INVASION OF PRIVACY
(By Plaintiffs JOHNSON & WADSWORTH
Against Defendants KNOWLES, CARLSON & TITUS)

43. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

44. At all times herein mentioned, Plaintiffs had a reasonable and legitimate right and expectation of privacy and sanctity in their persons and reputations, private and commercial. By the acts and omissions above described, Defendants to this cause of action, and each of them, invaded that right, without any reasonable or legitimate privilege or justification whatsoever, by casting Plaintiffs in the false light of disloyal Republicans, "moles""those homosexuals,""faggots" (by which term is implied a promiscuous, ridiculous male homosexual undeserving of respect), or other negative attributes which lessened the respect Plaintiffs had in their community. Defendant TITUS further cast Plaintiffs in the false light of social and/or political outcasts by his false statement that the September 12, 1994, vote to remove them from Defendant Central Committee was "unanimous," when it was, in fact, not.

45. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid. Said Plaintiffs further suffered special damages in the form of lost rental income from the Ranch as a proximate result of Defendants' and each of their, false statements, and other items of special damage stemming from their loss of standing in their community, as to be shown at trial.

8th CAUSE OF ACTION – DEFAMATION
(By Plaintiffs JOHNSON & WADSWORTH
Against Defendants KNOWLES, CARLSON & TITUS)

46. Plaintiffs incorporate as though fully set forth herein Paragraphs 1–23, and 44 & 45, inclusive, of this Class Action Complaint.

47. By their statements, acts and omissions above described, Defendants to this cause of action, and each of them, defamed Plaintiffs, without any reasonable or legitimate privilege or justification whatsoever, by calling Plaintiffs disloyal Republicans, "moles," "those homosexuals," "faggots" (by which term is implied a promiscuous, ridiculous male homosexual undeserving of respect), or otherwise uttered and/or caused to be printed words causing them to be shunned, derided and eventually ejected negative attributes that lessened the respect Plaintiffs had in their community. Defendant TITUS further defamed by his false statement that the September 12, 1994, vote to remove them from Defendant Central Committee was "unanimous," when it was, in fact, not.

48. Some or all of there defamations were heard by both co-Defendants and non-parties hereto, who understood them to be defamatory as to Plaintiffs JOHNSON and WADSWORTH.

49. As a proximate result of these acts by said Defendants, and each of them, Plaintiffs were injured and damaged as aforesaid. Said Plaintiffs further suffered special damages in the form of lost rental income from the Ranch as a proximate result of Defendants' and each

of their, false statements, and other items of special damage stemming from their loss or standing in their community, as to be shown at trial.

9th CAUSE OF ACTION – DECLARATORY RELIEF
(28 USC §2201)
(By All Plaintiffs Against All Defendants)

50. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

51. An actual controversy has arisen and now exists between the parties relating to the legal rights of all Plaintiffs and all Defendants in relation to the validity of the new bylaws adopted at the January 9, 1995, meeting of Defendant Central Committee, for which Plaintiffs desire a declaration of rights, including, but not limited to, a finding by this Court that said bylaws are null, void and unenforceable.

52. A declaratory judgment is necessary since Plaintiffs contend that the bylaws are inherently infirm and inconsistent with the U.S. and California Constitutions, as written, adopted and/or applied, and Defendants, and each of them, deny the same.

10th CAUSE OF ACTION – COMMON LAW
FAIR PROCEDURE
(By All Plaintiffs Against All Defendants)

53. Plaintiffs incorporate as though fully set forth herein Paragraphs 1 through 23, inclusive, of this Class Action Complaint.

54. By virtue of the long-established provisions of the common law, Plaintiffs JOHNSON and WADSWORTH had and have a right to be afforded the benefits of fair procedure, including, but not limited to, the rights of prior and adequate notice and the opportunity to defend themselves and present and examine witnesses in a fair and neutral hearing, before suffering any deprivation of their associational rights as members of Defendant Central Committee.

55. As a proximate result of Defendants' and each of their, acts and omissions aforesaid, Plaintiffs were damaged and are entitled to recover as alleged herein. WHEREFORE Plaintiffs pray for trial by jury and damages as follows:

1. For general damages;

2. For special damages according to proof;

3. For fines, penalties, costs, pre- and post-judgment interest and attorneys fees according to law;

4. For punitive damages against all Defendants, including both statutory and discretionary punitives;

5. For a permanent injunction and/or issuance of a writ of mandamus directing Defendants to reinstate Plaintiff WADSWORTH to Defendant Central Committee;

6. For a declaration of the rights and duties of the parties in relation to the new bylaws adopted January 9, 1995, and for a declaration that said bylaws' are invalid and have been without effect;

6. For such other and further relief as proper.

DATED: May 8, 1995

LAW OFFICES OF
G. MICHAEL GERMAN

/s/ G. Michael German
Attorney for Plaintiffs

T.D. Bolling, Jr., SBN 33236
Marjorie E. Manning, SBN 118643
BOLLING, WALTER & GAWTHROP
A Professional Corporation
8880 Cal Center Drive, Suite 400
Sacramento, CA 95826
Telephone No. (916) 369-0777
Telecopier No. (916) 369-2698

Attorneys for Defendants
REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; and DAVID TITUS

(SPACE BELOW FOR FILING STAMP ONLY)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PAUL JOHNSON; KEVIN WADSWORTH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA

CASE NO. CIV-S-95-835 MLS PAN

ORDER FOLLOWING HEARING ON DEFENDANTS' MOTIONS TO DISMISS

DATE: October 20, 1995
TIME: 9:00 a.m.
COURTROOM: The Honorable Milton L. Schwartz

(Filed Nov. 20, 1995)

COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS; and DOES 1-25, inclusive,

Defendants.
_____/

Defendants' motions to dismiss were heard October 20, 1995 before the Honorable Milton L. Schwartz. Michael German appeared on behalf of plaintiffs, Mark Spring of Diepenbrock, Wulff, Plant & Hannegan appeared on behalf of defendant David Knowles and Marjorie E. Manning of Bolling, Walter & Gawthrop appeared on behalf of defendants Republican Central Committee of El Dorado County, Steven Bailey, Robert Becker, Ed Borba, Bernard Carlson, Merlin Chardi, Christina Cowell, Charles Chrisman, Dan Dellinger, Tom Emigh, Michael Frenn, Maloa Gribkoff, Kevin Hanley, Tom Schumacher, John Stelzmiller, Laveta Stelzmiller, and David Titus. The Court announced its disposition of the motions and its reasons therefor into the record and ordered Ms. Manning to prepare a formal order consistent therewith.

For the reasons set forth in the attached transcript of proceedings, defendants' motions to dismiss the

complaint are granted. Plaintiffs shall have 45 days from the date of hearing within which to amend their complaint to state a claim pursuant to 42 USC § 1983 based on the deprivation of their First and/or Fourteenth Amendment rights and to seek appropriate declaratory relief. To the extent plaintiffs' section 1983 claim is based upon deprivation of their rights protected by Article I, Section 10 of the United States Constitution or the Fifth, Ninth, Tenth and Fifteenth Amendments to the United States Constitution, the claim is dismissed without leave to amend. Plaintiffs' section 1985(3) and section 1986 claims are also dismissed without leave to amend.

IT IS SO ORDERED.

DATED: November 20, 1995

/s/ Milton L. Schwartz
MILTON L. SCHWARTZ,
UNITED STATES
DISTRICT JUDGE

COURT: U.S. District Court, Eastern District of California

CASE NO.: CIV-S-95-835 MLS PAN

CASE NAME: *Johnson v. Knowles, et al.*

PROOF OF SERVICE

I am a citizen of the United States, employed in the County of Sacramento, State of California. My business address is 8880 Cal Center Drive, Suite 400, Sacramento, California 95826. I am over the age of 18 years and not a party to the above-entitled action.

I am readily familiar with Bolling, Walter & Gawthrop's practice for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to said practice each document is placed in an envelope, the envelope is sealed, the appropriate postage is placed thereon and the sealed envelope is placed in the office mail receptacle. Each day's mail is collected and deposited in a U.S. mailbox at or before the close of each day's business. (CCP § 1013a(3).)

On November 8, 1995, I caused the within **ORDER FOLLOWING HEARING ON DEFENDANTS' MOTIONS TO DISMISS,** the original of which was produced on recycled paper, to be served via

__X__ MAIL –

Placed in the United States Mail at Sacramento, California.

G. Michael German, Esq.
Law Offices of G. Michael German
22 Second Street, Suite 310
San Francisco, CA 94105

Dennis Murphy, Esq.
DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
Sacramento, CA 95814

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that this Declaration is executed on November 8, 1995 at Sacramento, California.

ARTEEMAS GREENE /s/ Arteemas Greene

UNITED STATES DISTRICT COURT
IN AND FOR THE
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO, CALIFORNIA

PAUL JOHNSON, et al., Plaintiffs, vs. DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; et al., Defendants.	)	CASE NO. CIV-S-95-835 MLS PAN

REPORTER'S TRANSCRIPT

Held in the United States District court in and for the Eastern District, on Friday, October 20, 1995 before the Honorable Milton L. Schwartz, judge.

For the Plaintiffs: LAW OFFICES OF
G. MICHAEL GERMAN
22 Second Street, Suite 310
San Francisco, California 94105
BY: G. MICHAEL GERMAN

For the Defendants: BOLLING, WALTER & GAWTHROP
A Professional Corporation
8880 Cal Center Drive, Ste. 400
Sacramento, California 95826
BY: MARJORIE E. MANNING

For Defendant Knowles: DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Ste 1700
Sacramento, California 95814
BY: MARK SPRING

Reported by: Diane J. Shepard, CSR #6331 RPR

[p. 2] SACRAMENTO, CALIFORNIA, FRIDAY, OCTOBER 20, 1995

THE COURT: This matter is before the Court on Defendants' motions to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) (which I will refer to hereafter just as that rather than going through the entire name.)

Plaintiffs filed suit seeking damages and injunctive and declaratory relief for claims arising under 42 U.S.C. Sections 1983, 1985(3) and 1986 and also under state law. Plaintiffs allege that Defendants ousted them from their seats on the Republican Central Committee for El Dorado County (which I'll refer to as simply "the Committee") because of Plaintiffs' status as homosexuals. They seek to represent the class of quote, "registered republican voters in Supervisorial District III of El Dorado County who voted for said Plaintiffs for membership on the committee in the June 1992 and June 1994 primary elections and whose votes were thereafter twice nullified by the acts of Defendants." unquote Defendants are: (1) David Knowles, Republican member of the California Assembly for the Fourth Assembly District; (2) the Committee; and (3) sixteen individual members of the Committee.

[p. 3] Specifically, Plaintiffs allege that they are long-standing members of the California Republican Party

who for seventeen years have been and have held themselves out to third parties to be exclusive life partners. In June 1992 and again in June 1994 they were elected to two-year terms on the Committee via the El Dorado County primary election ballots. However, Plaintiffs were removed from their seats for the 1993 to 1995 term pursuant to a vote taken at the September 12, 1994 Committee meeting. Neither Plaintiff was in attendance at the meeting at the time the vote was taken. Thereafter, Plaintiff Johnson resigned his membership in the Republican Party, but Plaintiff Wadsworth resolved to take his seat on the Committee for the 1995 to 1997 term.

At a noticed organizational committee meeting held on January 9, 1995, Plaintiff Wadsworth was sworn in as a committee member for the 1995-1997 term. Over his objection, the Committee then adopted bylaws. Included in these bylaws is Article XIX, which allows for the removal of any member, quote, "acting in a manner deemed injurious to the Central Committee or its purposes." unquote On February 13, 1995, a motion to remove Wadsworth [p. 4] from the Committee for the 1995-1997 term was passed. Plaintiffs allege that Defendants' actions removing them from their seats on the Committee were motivated by and based on Plaintiffs' homosexuality.

Defendants now move to dismiss pursuant to Rule 12(b)(6) on the grounds that Plaintiffs have failed to state any federal claim.

A Rule 12(b)(6) motion is decided by primary reference to the allegations in the complaint. quote, "For purposes of the motion to dismiss, the complaint is construed

in the light most favorable to the plaintiff and its allegations are taken as true." unquote *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court may not dismiss the complaint under Rule 12(b)(6) unless it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to relief. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, (1984). But the court is not to assume that plaintiffs can prove facts not alleged or that defendants have violated the law in ways that have not been alleged. *Associated General Contractors v. California State Council*, 459 U.S. 519, 526 (1983).

First, Defendants maintain that Plaintiffs [p. 5] have not stated a claim under Section 1983. To state a Section 1983 claim, Plaintiffs must show two essential elements: (1) that Defendants acted under color of state law; and (2) that Defendants caused them to be deprived of a right secured by the Constitution and laws of the United States. *Howerton v. Gabrica*, 708 F.2d 380, 382 (9th Cir. 1983). The court finds that Plaintiffs have failed to satisfy the first element, and with respect to some of the alleged constitutional deprivations, have also failed to satisfy the second element.

As to the first element, a person acts under color of law when exercising or purporting to exercise power. quote "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." unquote *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991).

Generally, public officials or employees act under color of law while acting in their official capacity or while exercising responsibilities pursuant to state law. *Dang*

Vang, 944 F.2d at 479. Defendant Knowles, in his capacity as a member of the State Assembly, is unarguably a public official. However, quote "the Ninth [p. 6] Circuit looks to the nature of the conduct involved, as well as the surrounding circumstances, and not simply to the defendant's official capacity," unquote to determine whether a public official acted under color of law. *Anthony v. County of Sacramento, Sheriff's Dept.*, 845 F. Supp. 1396, 1400 (E.D. Cal. 1994). Accordingly, the Court must determine whether Knowles' actions were related to the duties and powers incidental to his public position.

The Court has examined all the complaint's allegations regarding the conduct of Knowles. It does not appear that the conduct of which Plaintiffs complaint relates to Knowles' performance of his duties as a member of the Assembly. Rather, it appears that Knowles was acting in his private capacity as a member of the Republican Party. Without any allegations connecting the conduct complained of to Knowles' duties as an Assembly member, Plaintiffs have failed to sufficiently allege that Knowles was acting under color of law by virtue of his status as a public official.

The remaining defendants include the Committee and individual members of the Committee. Plaintiffs' contention that the Committee is a [p. 7] public agency and its members are public officials by virtue of state regulations via the California Elections Code is contrary to controlling law. See *Jackson v. Metro. Edison Co.*, 419 U.S. 347, 350 (1974). Therefore, the remaining Defendants must be considered to be private parties.

A private individual or entity acts under color of law where there is quote "significant state involvement in the action." unquote. *Howerton*, 708 F.2d at 382. Accordingly, the Court must examine the actions of private defendants to determine if they meet this standard.

Although the requirement that a person act under color of state law is technically separate from the Fourteenth Amendment's state action requirement, in cases such as this where all of the alleged constitutional deprivations require state action, the two requirements can be treated as equivalent. *Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989), cert. denied, 493 U.S. 1056 (1990).

The Supreme Court has articulated the following tests to determine when the actions of a private individual or entity amount to state action: (1) the public function test; (2) the [p. 8] joint action test; (3) the state compulsion test; and (4) the nexus test. That's from the same citation in *Howerton*. Plaintiffs maintain that they meet both the public function test and the joint action test.

Under the public function test, a private party can be found to be a state actor where the private party exercises powers that are traditionally exclusively reserved to the state, such as holding elections. *Flagg Brothers v. Brooks*, 436 U.S. 149, 157-158 (1978). Plaintiffs contend that Defendants engaged in state action because Plaintiffs were elected to office via the primary election ballot, and Defendants' action ousting them from their offices nullified the election results. This simply stretches the public function test too far.

The cases holding that conducting elections amounts to state action concerned the election of public officials. See *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). Although plaintiffs here were elected to their positions via the primary election ballots, they were not elected to public offices but rather to positions within the internal organization of the [p. 9] Committee. The management of the internal governance of a political party is simply not a power traditionally exclusively reserved to the state. See *Banchy v. The Republican Party of Hamilton County*, 898 F.2d 1192, 1196 (6th Cir. 1990). Therefore, Plaintiffs have failed to satisfy the political function test.

Next, Plaintiffs contend that they satisfy the joint action test. This test is met where the private party is a quote "willful participant in joint activity with the State or its agents". *Howerton*, 708 F.2d at 383. One way to establish joint action is to demonstrate a conspiracy between private parties and the government. That's from the same citation in *Howerton*. Plaintiffs maintain that they have sufficiently alleged a conspiracy between Knowles and the other Defendants to oust Plaintiffs from their positions on the Committee. However, because Plaintiffs have failed to show that Knowles was acting under color of law, they have not demonstrated a conspiracy between the private defendants and a government actor. Thus, Plaintiffs have not satisfied the joint action test.

[p. 10] Accordingly, the Court finds that Plaintiffs have failed to sufficiently allege that any of the Defendants were acting under color of state law.

As to the second element of a Section 1983 claim, Defendants maintain that Plaintiffs have failed to adequately allege the deprivation of any federal constitutional or statutory right. Plaintiffs' complaint alleges that Defendants violated their rights protected by Article I, Section 10 of the United States Constitution and by the First, Fifth, Ninth, Tenth, Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs, however, concede that they cannot state a claim for deprivations of their rights guaranteed by Article I, Section 10 or the Fifth, Ninth and Tenth Amendments. Therefore, the Court needs only to determine whether Plaintiffs have stated a claim under the First, Fourteenth and Fifteenth Amendments.

After carefully reviewing the complaint, the Court finds that the allegations purporting to show a violation of the First Amendment are too vague to be reasonably analyzed under the Rule 12(b)(6) standard. Therefore, to the extent that Plaintiffs' Section 1983 claim depends on a [p. 11] deprivation of their First Amendment rights, it is dismissed sua sponte for failure to comply with Federal Rule of Civil Procedure 8(a).

That's the rule that requires a plain, clear and simple statement of the cause of action and the jurisdiction on which it's based.

As to Plaintiffs' claim of a deprivation of their Fourteenth Amendment rights, the Court recognizes that homosexuals do not constitute a suspect or quasi-suspect class. See *High Tech. Gays v. Defense Industry Sec. Clearance Off.*, 895 F.2d 563, 574 (9th Cir. 1990). This, however, does not preclude Plaintiffs' claim because they may be able to

show that Defendants' actions were not rationally related to any legitimate interest. From the same citation.

Next, the Court finds that Plaintiffs have not alleged a deprivation of their Fifteenth Amendment rights. The Fifteenth Amendment prohibits the denial of the right to vote on account of race, color or previous condition of servitude in, quote "any election in which public issues are decided or public officials selected." end quote That's from *Terry*, 345 U.S. at 468.

Plaintiffs' claim of a deprivation of their [p. 12] Fifteenth Amendment rights fails for two reasons. First, the votes that Plaintiffs claim were nullified were not for the selection of public officials. Second, Plaintiffs do not allege that anyone's right to vote was denied on account of race, color or previous condition of servitude. Therefore, Plaintiffs have failed to allege a deprivation of their Fifteenth Amendment rights.

In summary, Plaintiffs' Section 1983 claim is deficient for the following reasons: (1) they have failed to allege that any Defendants acted under color of state law; (2) they have conceded that they cannot state a claim for the violation of Article I, Section 10 of the U.S. Constitution or the Fifth, Ninth and Tenth Amendments to the United States Constitution; (3) their allegations of a deprivation of their First Amendment rights do not meet the requirements of Federal Rule of Civil Procedure 8(a); and (4) they have failed to adequately allege a deprivation of their Fifteenth Amendment rights. Additionally, the Court finds that the deficiencies of Plaintiffs' Section 1983 claim to the extent it relies on a deprivation of their

Fifteenth Amendment rights cannot be cured by amendment. Therefore, Defendants' motions with [p. 13] respect to Plaintiffs' Section 1983 claim are GRANTED, and Plaintiffs are granted leave to amend their complaint to properly allege a Section 1983 claim only insofar as the claim relies on a deprivation of their First and/or Fourteenth Amendment rights.

The Court now addresses whether Plaintiffs have stated a claim under 42 U.S.C. Sections 1985(3) and 1986.

To state a claim under Section 1985(3) a plaintiff must allege: (1) a conspiracy; (2) to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) an act by one of the conspirators in furtherance of the conspiracy; and (4) a personal injury, property damage or deprivation of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983) (citing *Griffin v. Breckenridge*, 403 U.S. § 8, 102-03 (1971)). Homosexuals are not a, quote "class" unquote, within the meaning of Section 1985(3). *DeSantis v. Pacific Tel. and Tel. Co., Inc.*, 608 F.2d 327, 333 (9th Cir. 1979). Therefore, Plaintiffs have failed to state a claim [p. 14] under Section 1985(3).

Section 1986 imposes liability on individuals who knowingly fail to prevent a violation of Section 1985. Because Plaintiffs have failed to state a claim under Section 1985(3), they also have failed to state a claim under Section 1986. Accordingly, Defendants' motions with respect to Plaintiffs' Sections 1985(3) and 1986 claims are GRANTED. Because the Court finds that amendment as

to these claims would be futile, they are dismissed without leave to amend.

Finally, because Plaintiffs have failed to state a claim that would give this court jurisdiction to award declaratory relief under 28 U.S.C. Section 2201, Defendants' motions to dismiss Plaintiffs' claim for declaratory relief are GRANTED with leave to amend. See *Skelly Oil Co. v. Philips Petroleum Co.*, 339 U.S. 667, 671 (1950).

Finally, the Court finds that Plaintiffs have failed to state a claim pursuant to 42 U.S.C. Sections 1983, 1985(3) and 1986 and have failed to establish that the Court has jurisdiction to award declaratory relief pursuant to 28 U.S.C. Section 2201.

[p. 15] Accordingly, for the foregoing reasons, the court GRANTS Defendants' motions to dismiss. Plaintiff's are hereby granted 45 days' leave to amend their complaint to state a Section 1983 claim based on the deprivation of their First and/or Fourteenth Amendment rights and to seek appropriate declaratory relief. To the extent that Plaintiffs' Section 1983 claim is based upon deprivations of their rights protected by Article I, Section 10 of the United States Constitution or the Fifth, Ninth, Tenth and Fifteenth Amendments to the United States Constitution, the claim is DISMISSED without leave to amend. Plaintiffs' Section 1985(3) and Section 1986 claims are also DISMISSED without leave to amend.

MS. MANNING: Thank you, your Honor.

MR. GERMAN: Your Honor, I would ask one indulgence from the Court and from Counsel, and that 45

days to leave to amend be granted. The reason for that is –

THE COURT: That's fine.

[p. 16]REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
)
COUNTY OF SACRAMENTO)

I, DIANE SHEPARD, certify that I was the Official Court Reporter, Pro tem, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 15, inclusive, constitute as complete, true and correct record of said proceedings:

COURT: United States District Court

JUDGE: The Honorable Milton L. Schwartz

CAUSE: Johnson, et al. v. Knowles, et al.

DATE: October 20, 1995

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 25th day of October, 1995.

/s/ Diane J. Shepard
DIANE J. SHEPARD
CSR NO. 6331, RPR

NINTH CIRCUIT CASE NO. 96-15852
E.D. CAL. CASE NO. CIV-S-95-835 MLS (PAN)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

Plaintiffs/Appellants,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; SAN [sic] DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS & DOES 1-25

Defendants/Appellees.

OPENING BRIEF OF PLAINTIFFS/APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
NO. CIV-S-95-835 MLS (PAN)
HONORABLE MILTON L. SCHWARTZ, JUDGE

G.MICHAEL GERMAN - 103312
LAW OFFICES OF
G. MICHAEL GERMAN,
A Professional Corporation
22 Second Street - Suite 310
San Francisco, CA 94105-3406
(415) 536-1838
Attorney for Plaintiffs/Appellants
PAUL JOHNSON;
KEVIN WADSWORTH;
LAUREN COOPER;
RAY SEBASTIAN &
BARBARA SEBASTIAN,
individually and
on behalf of all others similarly
situated.

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STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

This appeal follows the district court's dismissal of Plaintiffs' first amended class action complaint without leave to amend, which pled federal question and state tort law supplemental jurisdiction under the provisions of 28 USC §§1331, 1343, 1357 and 1367 pursuant to 42 USC §1983 civil rights and 28 USC §2201 declaratory relief claims stemming from a pair of election disputes.

This court has appellate jurisdiction as an appeal of right of a final decision of a district court pursuant to 28 USC §1291. Plaintiffs'/Appellants' Notice of Appeal was timely filed under FRAP 4a on April 18, 1996, within 30 days after entry of the district court's March 20, 1996, order and judgment.

REQUEST FOR ATTORNEYS FEES

Per Ninth Circuit Rule 28-2.3, Plaintiffs will seek recovery of attorneys fees for this appeal under the inherent powers of the court and pursuant to 42 USC §1988.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether ousters of duly elected members of a county Republican central committee by other members of that committee, including an active state Assemblyman sitting *ex officio* on the committee and his appointee, constitute state action for purposes of pleading Plaintiffs' federal civil rights and declaratory relief claims.

Whether Defendants deprived Plaintiffs of a federally protected Constitutional right.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Prior Disposition

Plaintiffs PAUL JOHNSON and KEVIN WADSWORTH, are two gay men who have been life partners since 1978 – and politically active Republicans for almost as long. CR 28 at ¶¶6 & 7. Twice elected by fellow El Dorado County Republicans, who knew both their personal and political proclivities, to their county's central committee, they were twice ousted from it by a case of intolerant members whose leaders vowed "to get rid of those faggots." *Id.* Plaintiffs then filed a class action complaint, on behalf of themselves and their fellow Republicans who elected them to office, for damages and for

declaratory and equitable relief, including Wadsworth's reinstatement to the committee, based upon 42 USC §1983. CR 1.

Defendants David Knowles, an active member of the California Assembly and *ex officio* member of the central committee, and 16 other committee members who voted to oust Johnson and Wadsworth, moved to dismiss Plaintiffs' complaint under FRCvP 12b for failure to state a claim upon which relief can be granted. Per stipulation of counsel after an early status conference, it was agreed that Defendants would first challenge only Plaintiffs' federal claims, leaving the state law tort claims to be addressed if federal jurisdiction was found. CR 14. Defendants' motions to dismiss were granted and all but Plaintiffs' I and XIV Amendment claims under 42 USC §1983 and their declaratory relief claims under 28 USC §2201 were dismissed without leave to amend. CR 26 & 27.

Joined by fellow Republicans Ted and Lauren Cooper and Ray and Barbara Sebastian, Plaintiffs timely filed a first amended class action complaint, to which Susan Emigh was added as a Defendant. CR 28. Defendants again moved to dismiss under FRCvP 12b6 for failure to state a claim and their motion was granted. CR 40. As before, and now, the crucial issue for decision was whether or not Defendants' actions in ousting Johnson and Wadsworth were state action, a necessary component of any §1983 civil rights claim. In again rejecting Plaintiffs' argument that "defendants engaged in state action because Johnson and Wadsworth were elected to office via the primary election ballot and defendants' action ousting them from their offices nullified the election

results," the court noted that Plaintiffs' contention "simply stretches the public function test too far." CR 27 at 8:12-17; CR 40 at 9:17-22.

Judgment thereafter issued upon the order of dismissal, CR 41, and this appeal of right was timely filed on April 18, 1996. CR 44. Pursuant to 28 USC §1367d, Plaintiffs timely filed a verified class action complaint in the Superior Court of California, in and for El Dorado County, similar to their first amended complaint forming the subject of appeal but purged of its federal claims and of Ted Cooper as a co-Plaintiff. Per Defendants' timely motion therein, that action has since been stayed pending the results of this appeal, pursuant to Cal. Code of Civ. Prodedure (CCP) §§410.30 and 418.10a2. Exs. A and B to Addendum.

B. Statement of Facts

The first amended complaint identifies Defendant Republican Central Committee of El Dorado County (committee) as

> "existing and operating solely by virtue of, under and in furtherance of the laws of this State, including, but not limited to Cal. Elections Code (CEC §7250-7470 and 18540-18700, whose chairman is Defendant DAVID TITUS and whose meetings are held at 3161 Cameron Park Drive, Suite 107, Cameron Park, CA. Membership in the Central Committee is composed primarily by the election thereto of registered members of the Republican Party resident in El Dorado County by their fellow Republican electors resident in El Dorado County voting in

primary elections, noticed, organized, conducted, supervised and officially reported by the State of California. Membership in the Central Committee is recognized as a *de facto* prerequisite to higher office, both elected and appointed, within the Republican Party at the county, state and national levels, and within municipal, county, state and national government, and thereby benefits government by providing it with a pool of persons presumably experienced in the workings of the democratic process within the republican form of government guaranteed by the Constitution, of and throughout, the United States. Running and casting and receiving votes for membership on the Central Committee is also a legitimate exercise of the most elementary form of participatory democracy in a local forum as guaranteed by the I and XIV Amendments to the U.S. Constitution protecting the fundamental rights of voting, assembling and petitioning for redress and participating equally in the political process." CR 28 at ¶2.

"Defendant DAVID KNOWLES is an elected Republican member of the California Assembly for the 4th Assembly District who has and continues to maintain his local legislative office at 3161 Cameron Park Drive, Suite 214, Cameron Park, CA, which suite number Plaintiffs are informed, believe and allege thereon does not exist separately from Suite 107, per the records of the El Dorado County Assessor. Plaintiffs also are informed, believe and expect to discover facts supporting their further allegation that by virtue of his status as a member of the California Assembly, Defendant KNOWLES has the

> right and power to appoint members to the Central Committee under CEC §§7250-7470 and, using that power, exercised influence, direct and indirect, over the decisions, workings and administration of the Central Committee relevant hereto, as evidenced by his January, 1993, appointment of Defendant LAVETA STELZ-MILLER to the Central Committee, by his directing his former legislative aide Defendant BECKER and other members of his legislative staff, on the "official" time and expense of the California State Assembly, to vote against adoption of the Central Committee's 1994 platform drafted by Plaintiff WADSWORTH and to thereafter bring about the ouster of Plaintiffs JOHNSON and WADSWORTH from the Central Committee and by his directing the placement of campaign signs and literature supporting himself displayed to the public and within the premises of Suite 107/214 of 3161 Cameron Park Drive, Cameron Park, CA, in violation of those statutes and bylaws of El Dorado County and of the State of California prohibiting such politicking in Central Committee offices, but acquiesced to by certain members of the Central Committee, including but not limited to Defendants herein." CR 28 at ¶3.

The remaining individual Defendants are all duly elected and/or alternate appointed members of the committee who likewise acted pursuant to the same governing California statues. *Id.*

Since 1978, Plaintiffs Paul Johnson and Kevin Wadsworth have lived together as exclusive life partners and held themselves out to third parties as the same, sharing

living expenses, space and resources. CR 28 at ¶6. Plaintiffs have been longtime registered members of the California Republican Party and have served with distinction on other central committees in this state, and were,

> "in 1992 and 1994, elected and reelected by their fellow Republicans of El Dorado County, Supervisorial District III, including, but not limited to Plaintiffs TED COOPER, LAUREN COOPER, RAY SEBASTIAN & BARBARA SEBASTIAN, to two-year seats on Defendant Central Committee, which seats they held with integrity and dedication from January, 1993, until ousted therefrom by Defendants as pled below. JOHNSON and WADSWORTH received in the June, 1994, primary election 1,585 and 1,562 votes, respectively and they are informed, believe and recall that they received a substantially similar number of votes in the June, 1992, primary election as well. JOHNSON and WADSWORTH won the June, 1994, primary election despite the best efforts of certain of their colleagues on the Central Committee and other California Republicans, including but not limited to Defendants KNOWLES and CARLSON, who vowed "We've got to get rid of those faggots," and actively worked to do so." CR 28 at ¶7 and Exhibit C thereto.

Johnson and Wadsworth's El Dorado County home is "The Lone Antler Ranch," which they occasionally lease for receptions, fund-raising and other uses. Proceeds from Ranch rentals are used to defray the cost of medical treatment for Wadsworth, who is a disabled Vietnam-era Marine Corps veteran suffering from AIDS. CR 28 at ¶8. Johnson leased the Ranch to the Katie Hirning For Congress Campaign for a September 17, 1994, fundraiser for

Ms. Hirning, the Democratic candidate for the November, 1994, 4th Congressional District election, in which she opposed incumbent Republican Congressman John Doolittle. Per the Committee's bylaws, the lease specifically provided that neither Johnson's nor Wadsworth's name would be used in connection with the fundraiser, which was held as scheduled. Neither Johnson nor Wadsworth took part in it except as lessors, CR 28 at ¶9, a practice also engaged in by at least one other Defendant with respect to his own property, but without the same consequences that Plaintiffs suffered. CR 28 at ¶16.

> "On September 5, 1994, one week before the regularly scheduled meeting of Defendant Central Committee, JOHNSON and WADSWORTH learned that JOHNSON's father had died in Ohio that day. Both Plaintiffs immediately made plans to travel to Ohio to attend the funeral and advised Defendants SCHUMACHER and LAVETA STELZMILLER thereof by telephone and FAX that same day, noting it was possible each would not be able to attend the September 12, 1994, meeting, to which no Defendant responded. WADSWORTH did not travel to Ohio due to his need to receive regularly scheduled experimental medical AIDS treatment at Marshall Hospital. Such treatments are lengthy, painful and leave the patient feeling weak and nauseous for several days after administered." CR 28 at ¶10.

> "Wadsworth underwent such treatment beginning at 11:00 am on September 12, 1994, and appeared at the meeting of Defendant Central Committee at 7:30 p.m. that same day. The meeting was called to order by Defendant

TITUS and proceeded with its business, including the election of Defendant BECKER to the Central Committee, until WADSWORTH begin to feel ill. WADSWORTH then gave the Central Committee a check in the amount of $69.75, representing the closing balance from his reelection campaign committee, Riff Raff Republicans PAC, pursuant to operative provisions of the CEC and left. Prior to that point in the meeting, neither its notice, agenda nor any discussion once underway gave Wadsworth any sign that any action was to be taken against him." CR 28 at ¶11.

"Thereafter, under the direction of Defendant TITUS, Defendant Central Committee purported to go into "Executive Session," despite any provision therefor in the governing bylaws of the Central Committee or the CEC, where Defendant EMIGH initiated discussion of Plaintiffs JOHNSON's and WADSWORTH'S role in the Hirning fundraiser held at the Ranch and moved that each be removed from the Central Committee for allegedly failing to support Republican candidates and for providing support to Democratic candidates. After discussion supporting the motion from Defendants CARLSON and BECKER, the motion was passed as follows:

AYES: 13 (BAILEY, BECKER, BORBA, CARLSON, CHRISMAN, DELLINGER, EMIGH, FRENN, GRIBKOFF, HANLEY, L. STELZMILLER, J. STELZMILLER & TITUS; CHARDI, alternate)

NAYS: 1 (Gilmore) ABSTENTIONS: 3 (Aguiar, Collens & Messenger)

> Plaintiffs are informed, believe and allege thereon that Defendant KNOWLES instructed, prevailed upon or otherwise influenced Defendants BECKER and LAVETA STELZMILLER to vote for Plaintiffs' ouster." CR 2B at ¶12.

The Committee never informed either Plaintiff of its action in removing them; they learned of it from articles in the local press, which quoted Defendant Titus as stating both Plaintiffs were "unanimously ousted." Wadsworth vowed to continue as a Republican but Johnson realigned his longstanding Republican party membership in disgust and re-registered as a Democrat. CR 28 at ¶13.

Between December 31, 1994, and January 3, 1995, Laveta Stelzmiller mailed Committee members notice of its January 9, 1995, organizational meeting. Enclosed was a proposed resolution urging the dismissal of a state employee but no agenda. At that meeting, Wadsworth was sworn into his elected committee office and Defendants Titus, Schumacher, Becker and Gribkoff were elected Chairman, Vice-Chairman, Secretary and Treasurer, respectively. While it has been customary for those elected officials, such as Knowles and Congressman Doolittle, who have the right to appoint members to the committee under CEC §§7250-7470 to do so at this Organizational Meeting, neither Knowles nor Doolittle then did so. CR 28 at ¶14.

An organizational agenda given to those present at the meeting listed "Adoption of By-laws" as item III, but a copy of the proposed bylaws was not included with the notice. Wadsworth objected to consideration of these proposed bylaws as out-of-order, because of this inadequate

notice, but Titus ruled his objection out-of-order. Schumacher's motion to adopt the bylaws was seconded by Carlson and approved. CR 28 at 8:14-20 and Exhibit A thereto.

Plaintiffs pled on information and belief that Titus had directed Becker to draft these new bylaws prior to the January 9, 1995, meeting and that other Defendants, including but not limited to Tom Emigh and Knowles, knew that the new bylaws would be drafted and presented for adoption on January 9, 1995. Once adopted, Emigh stated his intention to seek Wadsworth's removal at the Committee's next meeting, set for February 13, 1995, purportedly under new bylaw Article XIX "for engaging in actions injurious to the Committee." CR 28 at ¶15.

> "On February 6, 1995, Defendant BECKER mailed a notice of the February 13, 1995, meeting to all members of Defendant Central Committee, accompanied by an agenda which listed as item IXA "Disciplinary Action." At the meeting, Defendant EMIGH moved, and Defendant CARLSON seconded, the removal of Plaintiff WADSWORTH "for engaging in actions deemed injurious to" the Central Committee. After discussion of the motion from, among others, Defendants BECKER, CARLSON, and EMIGH and SCHUMACHER, including, but not limited to, alleged statements made and actions taken by WADSWORTH prior to January 9, 1995; statements criticizing the Central Committee allegedly made by WADSWORTH and overheard by Defendant SUSAN EMIGH, wife of Defendant EMIGH, in a restaurant on January 19, 1995, and thereafter memorialized by her in

"sworn testimony" not produced at the meeting; a December 15, 1995, letter allegedly sent by Katie Hirning to her "supporters," which letter was neither then shown to WADSWORTH nor seen by him at any time prior or since the meeting; concern that the Central Committee beware of expelling members who rent property to Democrats, in light of SCHUMACHER's regularly renting property jointly owned by him and a registered Democrat to Democrats; and Defendant KNOWLES' admission to SCHUMACHER that his reason for pushing, directly or indirectly through his aide BECKER and other members or appointees to the Central Committee, the removal of WADSWORTH therefrom was due to his "being homosexual," the motion was passed as follows:

AYES: 9 (BECKER, CARLSON, COWELL, DELLINGER, EMIGH, GRIBKOFF, SCHUMACHER, J. STELZMILLER & TITUS)

NAYS: 3 (Colvin, Gilmore & WADSWORTH) ABSTENTIONS: 1 (CHRISMAN)" CR 28 at ¶16.

Plaintiffs pled on information and belief that Knowles instructed, prevailed upon or otherwise influenced Becker to vote for Wadsworth's ouster. On March 13, 1995, Laveta Stelzmiller and Cecil Ringgenberg were elected to fill the seats of Johnson and Wadsworth by acclamation of those members of the committee then present. Plaintiffs similarly pled that these Defendants knew that Laveta Stelzmiller had failed to win enough votes in the June, 1994, primary to be elected to the committee, but elected her to membership despite this

knowledge "in direct contravention of the will of the electorate." *Id.*

In ousting Plaintiffs, Defendants acted without probable cause

> "In arbitrary and capricious abuse of legitimate legal processes and in violation of clearly and long established rights guaranteed to all Plaintiffs under the I and XIV Amendments to the Constitution of the United States, since named plaintiffs had twice been elected to the Central Committee by their fellow registered Republicans; since the bylaws drafted by Defendant BECKER and purportedly adopted by the Central Committee on January 9, 1995, both as written and enforced, were overbroad, vague and incapable of Constitutional comprehension; and since the enforcement of those bylaws against Plaintiff WADSWORTH under the provisions of CEC §§7250-7470 and 18540-18700, violated all Plaintiffs' I and XIV Amendment rights without rational connection to any legitimate purpose." CR 28 at ¶25.

The specific Constitutional rights infringed by Defendants, individually and in conspiracy among themselves, were Plaintiffs'

> "fundamental I Amendment rights of freedom of speech, expression and association, and of their right to participate in the electoral and political process by peaceably assembling and petitioning their government for redress of grievances by twice invalidating Plaintiffs' election of Plaintiffs JOHNSON and WADSWORTH to the Central Committee by ousting them therefrom as aforesaid and thereby stifling political

> debate in and electoral input to Defendant Central Committee. Defendants likewise deprived all Plaintiffs of their fundamental XIV Amendment rights against abridgement of their privileges or immunities as citizens of the United States and deprived all Plaintiffs of their protected liberty interests in a republican form of government without due process of law by twice invalidating Plaintiffs' election of Plaintiffs JOHNSON and WADSWORTH to the Central Committee by ousting them therefrom as aforesaid, in violation of their fundamental rights to participate in the electoral process by casting votes and having those votes count and determine who their elected representatives will be, without subsequent invalidation except as done in a manner consistent with due process and rationally related to some legitimate interest." CR 28 at ¶26.

Defendants were alleged to have acted under color of state law, including but not limited to CEC §§7250-7470 and 18540-18700, and the committee's 1995 bylaws. CR 28 at ¶28. Plaintiffs' remaining claims pled state constitutional, statutory (Unruh Civil Rights Act [Cal. Civil Code §§51-52.1]) and common law tort theories of relief, along with a federal declaratory relief claim under 28 USC §2201 directed against the 1995 bylaws. CR 28 at 16-21. They prayed for jury trial; special, general and punitive damages; costs, interest, and attorneys fees; injunctive relief in the form of reinstating Wadsworth to the committee; and for a declaration of the 1995 bylaws' invalidity.

Although class certification was neither sought nor determined prior to dismissal, certain of the class action

allegations are relevant to this appeal. Thus, Johnson and Wadsworth sued on behalf of themselves and those registered Republicans in their electoral district who voted for them in the June, 1992 and 1994 primaries and "whose votes were thereafter twice nullified" by Defendants' acts. As based upon those elections' returns, the potential class has a membership of 1,500-2,500 persons and its members share common damages by suffering "prejudice to and dilution and deprivation of their rights as voters effected by Defendants' " twin ousters of Johnson and Wadsworth. CR 28 at ¶¶21 and 22.

SUMMARY OF ARGUMENT

Each Defendant acted under color of state law under any of the four tests adopted by the Supreme Court for finding state action, whether individually or in conspiring with each other to deprive Plaintiffs of their federally protected right to participate equally in the political process.

ARGUMENT

Standard of Review

FRCvP 12b6 dismissals for failure to state a claim upon which relief can be granted are reviewed *de novo. Terracom v. Valley National Bank* (CA9: 1955) 49 F3d 555, 558. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, quoting *Conley v. Gibson* (1957) 355 US 41, 45-46, 78 SC 99, 102. Applying

this standard, all material allegations in the complaint are accepted as true, *id.*, as are any reasonable inferences therefrom, *Everest & Jennings v. American Motorists Ins.* (CA9: 1994) 23 F3d 226, 228, and are construed in the light most favorable to the pleader, *Moore v. City of Costa Mesa* (CA9: 1989) 886 F2d 260, 262, even if susceptible to more than one inference. *Columbia Natural Resources, Inc. v. Tatum* (CA6: 1995) 58 F3d 1101, 1109. Nor should a complaint be dismissed by reliance upon the improper legal theory; it should be allowed to proceed if the facts support any valid theory of relief, *Haddock v. Board of Dental Examiners of California* (CA9: 1985) 777 F2d 462, 464, no matter how unlikely or improbable of proof the alleged facts are. *Neitzke v. Williams* (1989) 490 US 319, 109 SC 2827, 1833 and *Allison v. California Adult Authority* (CA9: 1969) 419 F2d 822, 823 (prisoners' civil rights claim). Dismissals are "especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development," *Baker v. Cuomo* (CA2: 1995) 58 F3d 824, 828-19 (*sua sponte* dismissal of prisoners' *pro se* §1983 voting rights claim), or in certain civil rights actions, *Glendora v. Cablevision Systems Corp.* (CA2: 1995) 45 F3d 36, 37 (*pro se* claim). Indeed, in §1983 cases

> " 'the central objective of the Reconstruction-era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' . . . §1983 provides a 'uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation,' . . . and is to be accorded 'a sweep as broad as its language.'" *Felder v. Casey*

(1988) 'a sweep as broad as its language.'" *Felder v. Casey* (1988) 487 US 131, 139, 108 SC 2302, 2307 and cases cited therein.

I. DEFENDANTS' ACTIONS WERE STATE ACTION FOR PURPOSES OF §1983 LAW

A. Assemblyman David Knowles' Actions Were Done Under Color of Law

To state a claim under 42 USC §1983, it must be shown that defendants acted under color of state law to deprive plaintiffs of a right secured by the Constitution and laws of the United States. *Lugar v. Edmondson Oil Co., Inc.* (1982) 457 US 922, 931, 102 SC 2744, 2750; *Howerton v. Gabica* (CA9: 1983) 708 F2d 380, 382. As the trial court noted, "faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." CR 40 at 5:9-11, quoting *Blum v. Yaretsky* (1982) 457 US 991, 1003, 102 SC 2777, 2785: Medicaid patients' class action against state officials under XIV Amendment was "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment."

The district court recognized that while Defendant David Knowles was an Assembly member, it "must determine whether Knowles' actions were related to the duties and powers incidental to his public position." See, *Dang Vang v. Vang Xiong X. Toyed* (CA9: 1991) 944 F2d 476, 480. Looking to the nature of his conduct alleged in the first amended complaint, the court determined that "plaintiffs read too much into the designation of Knowles as an ex

officio member of the Committee and his power to appoint an alternate member of the Committee." CR 40 at 6:14-16. While the court rightly noted that Knowles' *ex officio* status derived from his position as his party's nominee for his Assembly seat, not from his Assembly membership, and that his appointive power is limited to one alternate member of the committee, the court may have misconstrued CEC §7406 when it stated that "the only advantage gained by virtue of Knowles' status as an Assembly member is that the Committee cannot withdraw his power to appoint an alternate," in comparison to the committee's "discretion to give this authority to any ex officio member, whether an incumbent officeholder or not." CR 40 at 7:3-4. Review of § 7406 in relation to §§7404 and 7405 reveals that *all* incumbent, *ex officio* members of the committee have appointive authority unfettered by committee discretion; non-incumbent *ex officio* members have only discretionary appointive authority from the committee. Appendix, Ex. C.

At least one reason used by the district court to find that Knowles' abuse of his position did not constitute state action is thus fundamentally flawed. Where one appointive power is tempered by committee discretion and the other is not, the reasonable inference is that he who holds unqualified power thereby wields greater power and influence over those who exercise discretion over persons with lesser power, i.e., committee members who have discretion over non-incumbent *ex officio* members. Further, it is reasonable to infer that unrestricted members' views receive greater credence and respect from committee colleagues than do those of one subject to committee discretion, in addition to that enhanced status

and credibility that normally accompanies public office, whether as a party's nominee or as the eventual officeholder.

Further, where it has been specifically pled that Knowles used his greater power to exercise influence over the decisions, working and administration of the committee by appointing Laveta Stelzmiller to the committee in 1993, where she later voted to oust Plaintiffs from the committee; directing his former legislative aid Robert Becker "and other members of his legislative staff, on the 'official' time and expense of the California State Assembly, to vote against adoption of the Central Committee's 1994 platform" drafted by Wadsworth, and that Becker twice voted to remove Plaintiffs from the committee; illegally placing his own campaign signs and literature in the offices of the committee without fear of having it take any action against him for doing so, CR 28 at ¶3; and vowing with his co-Defendant Bernard Carlson "'We've got to get rid of those faggots,' and actively worked to do so," CR 28 at 5:15, it is clear that an abuse of state-sanctioned political power has been pled, the only relevant issue at this level of inquiry.

The district court was obliged to draw all reasonable inferences from these facts, *Everest & Jennings, supra*, and to construe them in the light most favorable to the pleader, *Moore, supra*, even if susceptible to more than one inference. *Columbia, supra*. Instead, the court drew limited, unfavorable or no inferences from them in holding that "taken as a whole, the factual allegations of the complaint more readily typify conduct of one who happens to be a public official acting in the role of a private individual pursuing a personal political agenda." CR 40

at 7-B. The district court thus erred in finding Plaintiffs did "not allege facts demonstrating that Knowles' actions were related to the duties and powers incidental to his public position." Rather, they flowed directly from it. The facts pled and the inferences drawn from them demonstrate that "by virtue of his position in the Assembly." Knowles abused the political power conferred upon him by operation of California statutes to Plaintiffs' detriment.

The cases relied upon by the district court support Plaintiffs' position. What occurred was precisely the underhanded abuse of power that was recognized in *Dang, supra.* There, a rapacious Laotian state social worker regularly seduced refugee girls, in situations variously contended as on and off the job. The Ninth Circuit first cited *West v. Atkins* (1988) 487 US 49-50, 108 SC 2255-2256 for the rule that "a defendant in a §1983 suit acts under color of state law when he abuses the position given to him by the state." *Dang, supra,* at 479. Here, Knowles was an unfettered *ex officio* member of the committee by operation of Art. III, §2A of its bylaws, which incorporate the provisions of former CEC §§9324-9325 (recodified as §§7405-7405), a state-sanctioned grant of authority properly subject to judicial notice. Appendix, Ex. C.

It was properly alleged that Knowles abused his position in a manner constituting state action by not only advocating and assisting in the ouster of Johnson and Wadsworth, but by depriving the remaining potential class member Plaintiffs of their fundamental Constitutional right to vote and have that vote stand until Constitutionally canceled or confirmed in another election. As

with refugee girls in awe of government officials, *id.*, at 480, it is conceivable a jury could conclude from evidence supporting the pleadings in this case that Knowles "used his government position to exert influence and- . . . control" over his co-Defendants' to Plaintiffs' detriment. Clearly, if such evidence resulted in a verdict against Knowles, it would stand appellate scrutiny under *Dang*. "Misuse of power, possessed by virtue of state law and possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of law." *U.S. v. Classic* (1941) 313 US 299, 326, 61 SC 1031, 1043, cited with approval in *Lugar, supra*, at 929, 102 SC 2750 and in *Dang, supra*, at 479. Knowles' greater potential for influence and eventual misuse of it were possible only because his nomination to his office gave him power unaffected by discretion, as authorized by the committee's bylaws and by California's elections statutes.

The district court cited its earlier decision in *Anthony v. County of Sacramento* (ED, CA: 1994) 845 FS 1396 in dismissing Plaintiffs' complaint. However, the question of whether or not "Knowles' actions were related to the duties and powers incidental to his public position," must be answered in the affirmative. The facts pled reveal a clear connection between Knowles' *ex officio* status on the Committee, his appointive power and resultant enhanced credibility and prestige, and the subsequent ouster of Johnson and Wadsworth and violation of his own constituents' Constitutional voting rights. Just as a Sheriff's duties include protecting his inmates' rights, an Assemblyman's include safeguarding his constituents'

rights. Just as "[t]he Government is prohibited from retaliating for the lawful exercise of constitutional rights," *id.*, at 1400, its elected officials must be likewise bound.[1]

The district court cited *Laxalt v. McClatchy* (NV: 1985) 622 FS 737 to support its holding that while "the prestige of Knowles' office may have added to his influence on the Committee [that] is not enough to convert private action into action taken under color of law." CR 40 at 8:2-6. The conduct complained of in *Laxalt* was use of Senate stationery to demand a retraction, as required by Nevada libel law. "In so doing, he acted as would have any private citizen considering the possibility of filing suit for libel." *Id.*, at 747. Indeed, a public official with "greater access to the channels of effective communication," *id.*, at 748, quoting *Gertz v. Robert Welch, Inc.* (1974) 418 US 323, 344, 94 SC 2997, 3009, "must exercise that opportunity." *Id.*, at 747. Here, though, there was no such obligation incumbent upon Knowles. His obligations as an elected Assemblyman were to respect, defend and uphold the laws of the republican form of government that gave him his seat, including the will of the electorate that put both him and Johnson and Wadsworth into office. *Laxalt* has neither precedential nor factual value in resolving the state action question presented by this appeal. As to Defendant David Knowles, that question must be answered positively.

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[1] When and wherever they might so act, contrary to any argument that Knowles' actions were a "lark and frolic" so as to take him outside ambit of state action, as in workers compensation cases.

B. The Committee and Its Members Acted Under Color of Law

1. Defendants' Actions Satisfy the Public Function Test

The district court's November 20, 1995, Order correctly recognized the gravamen of Plaintiffs' complaint as their claim that "defendants engaged in state action because Johnson and Wadsworth were elected to office via the primary election ballot and Defendants' action ousting them from their offices nullified the election result." However, the court held "this simply stretches the public function test too far." CR 40 at 9:21-22.

The public function test is one of four methods the Supreme Court has set forth to determine if state action exists in sufficient degree to support a §1983 claim. *Howerton, supra,* at 383. The public function test supports a finding of state action where a private party exercises powers traditionally reserved to or delegated by the state, including conducting "state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.' " *Flagg Brothers, Inc. v. Brooks* (1978) 436 US 149, 158, 98 SC 1729, 1734, quoting *Terry v. Adams* (1953) 345 US 461, 484, 73 SC 809, 820.

That lesser contests could involve state action was hinted at in *Flagg,* when the Court specifically noted "that the conduct of the elections themselves is an exclusively public function" and further distinguished the "ordinary commercial transaction presented" in that case as not meriting the "special provision to protect equal access to

the ballot" codified in 42 USC §1971a1. *Id.*, at 158 and fn. 7. While Plaintiffs make no claim under §1971, and are mindful of the difference between elections to public office and private posts, the Court's reference to that statute and the cases interpreting it is significant: the political arena is especially deserving of Constitutional safeguards as one of the "very few . . . 'exclusively reserved to the State.' " *Flagg, supra,* at 58.

In *Morse v. Republican Party of Virginia* (1996) 116 SC 1186, the Supreme Court expanded both this theme and when party action could constitute state action in the context of a Voting Rights Act challenge to a purported poll tax imposed by Virginia Republicans upon their members. The issue for the Court was the same jurisdictional one in this appeal: what activity by a private political party amounts to state action? Moving beyond the bounds set by *Flagg,* the Court held that "the Party exercised delegated state power when it certified its nominee for automatic placement on Virginia's general election ballot." *Morse, supra,* at 1193-4.

Central to its decision was the Court's reliance upon the Texas "white primary *cases,*" which underlay the 1965 Act. *Id.*, at 1201-6, *Terry, supra,* and *Smith v. Allwright* (1944) 321 US 649, 64 SC 757. The Court rejected arguments that those cases were to be limited to race discrimination election disputes, *id.*, at 1204 and see *Republican Party of Arkansas v. Faulkner County, Arkansas* (1995) 49 F3d 1289, 1293: "The White Primary cases teach that realities, not labels, must guide our review of election laws," [collecting cases]; that either *Flagg* or *Jackson v. Metropolitan Edison, infra,* precluded finding state action by a political party "unless its nominees are virtually

certain to win the general election," *id.*, at 1207; and disposed of any claim that finding jurisdiction will "abridge associational rights protected by the First Amendment." *Id.* at 1209-10.

Plaintiffs do not contend that *all* actions of a political party, or of any of its subdivisions such as the Committee or its members, constitute state action; they do contend that *some* such actions, like Defendants' here, may impinge the fundamental right to vote by negating it under an act of state delegated authority. This contention is based upon a careful review of *Eu v. SF County Democratic Cen. Com.* (1989) 489 US 214, 109 SC 1013. In affirming this Court's holding in *SF County Democratic Cen. Com. v. Eu* (CA9: 1987) 826 F2d 814, that certain California regulations governing political parties violated the free speech and associational rights guaranteed their members by the I and XIV Amendments, the Supreme Court recognized that while California "heavily regulates its political parties," *Eu, supra,* at 216, 109 SC 1016, this itself is not enough; heavy regulation of private entities alone will not make them state actors or their conduct state action. *Jackson v. Metropolitan Edison* (1974) 419 US 345, 350-353, 95 SC 449, 453-454 (no state action found in §1983 claim against utility where obligation to furnish regulated service operates against utility, not state; *cf.*, Defendants' obligation to abide by the voters' will and governing law.) However, neither the Supreme Court nor the Ninth Circuit ultimately found that the actions of central committees could never be state action.[2]

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[2] This assertion stems from this Court's *first* opinion, *SF County Democratic Cen. Com. v. Eu* (CA9: 1986) 792 F2d 802,

While "how a party organizes itself, how it conducts its affairs and how it selects its leaders are decisions that must be left to the discretion of the party unless the state has a compelling interest that would justify state interference," CR 40 at 10:9-14 (quoting *Eu, supra,* at 230, 109 SC 1024), what occurred here went beyond mere internal management: the results of two primaries, even if "only" for party office, were nullified. "A State indisputably has a compelling interest in preserving the integrity of its election process," *id.*, at 231, 109 SC 1024, citing *Rosario v. Rockefeller* (1973) 410 US 752, 761, 93 SC 1245, 1251-2, and "a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Id.*, citing *Storer v. Brown* (1974) 415 US 724, 730, 94 SC 1274, 1279.[3] Unlike *Eu,* the instant

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vacated by the US Supreme Court and remanded "for further consideration in light of *Tashjian v. Republican Party of Connecticut,*" in *Eu v. SF County Democratic Cen. Com.* (1987) ___ US ___, 107 SC 864. Subsequently, in *Eu II,* this Court concluded "that *Tashjian* supports our previous decision and [we] accordingly reinstate our *judgment* affirming the district court *for the reasons set forth in this modified opinion.*" *SF County Democratic Cen. Com. v. Eu* (CA9: 1987) 826 F2d 814, 818 [emphasis added.] However, the closest characterization this Court could reach was that "The status of these committees under the [former] Elections Code is less clear than the State would have us believe." *Id.* What this convoluted procedural history makes clear is that there is no controlling authority foreclosing a finding that state action exists in the facts of this appeal.

[3] California's post-*Eu* Elections Code shows a high degree of state regulation of central committees consistent with finding state action. CEC §§7400-7470 constitute a comprehensive regulatory plan embracing which state officers hold or may appoint to committee membership (§§7404-7406); the

appeal *is* "a case where intervention is necessary to prevent the derogation of the civil rights of party adherents," suffered by Johnson, Wadsworth and their fellow Republicans who twice elected them to leadership posts. *Id.*, at 232, 109 SC 1025, as quoted with approval in *Morse, supra,* at 1210.

Defendants engaged in state action when they twice ousted Johnson and Wadsworth from the committee under the authority of the Elections Code. (*Cf.*, CEC §7413, delegating to committees the power to remove members popularly elected to them with CEC §§11000-11386, relating to recall.) It will not do to distinguish discrimination against gay candidates or their supporters from discrimination against their Black counterparts, *cf., Morse, supra,* at 1204; the right protected – the right to vote and to have one's vote counted (*U.S. v. Mosley* (1915) 238 US 383, 386, 35 SC 904, 905) – is fundamental and its guarantees apply across all class lines. "Generally speaking, the Supreme Court has required that parties be inclusive, allowing all interested persons to participate in party activities." *Republican Party of Arkansas, supra,* at 1294. What no court has required, and what Plaintiffs do *not* seek, is judicially mandating that one particular viewpoint replace the democratic debate

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requirement of an oath under Article XX, Sec. 2 of the state constitution (§7408); how vacancies are to be filled (§§7409 & 7410); how removals are to be effected (§7413); monthly use of state buildings for committee meetings without charge (§7430) and how committees may make rules and regulations (§7442). These statutes show considerable interplay between the state and central committees, all for the benefit and protection of the voters and our republican form of government.

among the voters' elected representatives to a party, the give and take of our republican form of government. By allowing Plaintiffs to be excluded from this process however, it is threatened at its most elementary level and cannot long stand.

Other decisions recognize central committees may engage in state action in some circumstances. *Banchy v. Republican Party of Hamilton County* (CA6:1990) 898 F2d 1192 involved §305.02 of the Ohio Revised Code, which made its county central committees "responsible for filling vacancies that occur in certain county offices formerly held by party members." *Id.*, at 1194. The Sixth Circuit held that while not

> "all actions of a central committee constitute state action[, w]hen performing the narrow duties assigned to it under section 305.02, the Central Committee of the Republican Party may well be engaging in state action. *State ex rel Hayes v. Jennings*, 173 Ohio St. 370, 374, 182 N.E.2d 546 (1962) ("[t]he power conferred by Section 305.02, Revised Code, upon central committeemen makes them public officers.")"
>
> "Intra-party elections of *officers* is not 'state action.' *Banchy, supra*, at 1194-96. (See also, *Federspiel v. Ohio Republican Party* (SD, OH: 1994) 867 FS 617, 623: "some of the duties of the Central Committee, *including replacing incumbents*, may be interpreted as "state action", that in turn does not make all of its acts state action.") [emphasis added.]

The public office/private post distinction should not control here; the disenfranchisement of a large number of voters by a small number of party officials who undid

their votes should. While in *Banchy* popularly elected committee members retained their elective office within the party and lost, if anything, only their immediate opportunity to elect their own intra-party officers, Plaintiffs lost must more: Johnson and Wadsworth, their positions as committeemen elected in the 1992 and 1994 primaries; the other named and potential class Plaintiffs, their votes and elected representatives on the committee, through whom they sought to influence its actions during Johnson's and Wadsworth's terms. A finding of state action is justified not because there exists in §305.02 a statutory mandate similar to that found in CEC §7410 (allowing for filling of committee vacancies by committee vote), but because the effect of Defendants' action transcends mere management of intra-party matters by undoing the result of an election. The same distinctions exist between *Federspiel, supra* (committee officers and executive committee members) and this appeal: elementary elective office, the basis of a republican form of government, was violated by Defendants' acts, not just higher intra-party office.

Blank v. Heineman (NE: 1991) 771 FS 1013 held in the context of analyzing whether a I Amendment 42 USC §1985(3) civil rights conspiracy claim had been pled, that

> " 'The normal role of party leaders in conducting internal affairs of their party, *other than primary or general elections,* does not make their party offices governmental offices or the filling of those offices state action.' " *Id.*, at 1018, quoting *Lynch v. Torquato* (CA3: 1965) 343 F2d 370, 372: disputed election of chairman of committee. [emphasis added.]

In *Blank*, a committee chairmanship was lost but committee membership remained intact; no state action was found. *Id.*, at 1014. Here, Defendants disallowed even that vestige of the electorate's trust in Plaintiffs and directly contravened the expressed will of the electorate, who were stripped of the candidates they had chosen and saddled with a candidate they had rejected. If such an abuse of the fundamental right to vote does not shock the conscience, it certainly goes beyond a simple intra-party dispute and violates the essential integrity of the electoral process, the basis for any democracy. *Burson v. Freeman* (1992) ___ US ___, 112 SC 1846, 1859; *Reynolds v. Sims* (1964) 377 US 533, 561-562, 84 SC 1362, 1377 and *Yick Wo v. Hopkins* (1886) 118 US 356, 371, 6 SC 1064, 1071. In doing so, it was tantamount to an act of the state.

Moreover, it is the *voters'* normal role to determine membership on central committees, not that of other committee members, except in limited circumstances, such as Knowles' statutory right to do so or in ways beyond the scope of this appeal and its focus on the pleadings. By ousting Johnson and Wadsworth from the committee, Defendants altered the results of primaries and engaged in state action just as if they had mounted a recall election. Thus, it is no impediment to Plaintiffs' claim that they do not challenge the "manner in which the[ir] election was conducted." That they were twice ousted from the committee by Defendants after twice being elected to it is enough: whether acting before, during or after the election, Defendants compromised its results just as surely as if the state had not allowed it to go forward in the first place. Indeed, with two elections and two ejections a matter of public record, the situation

is demonstrably one "capable of repetition, yet avoiding review" for jurisdictional purposes.

Gamza v. Aquirre (CA5: 1980) 619 F2d 449 set forth a guide for determining whether a particular challenge to a state election practice rises to a level deserving of federal protection:

> " . . . whether it was inflicted intentionally or accidentally whether it is part of a pattern that erodes the democratic process or whether it was more akin to a negligent failure properly to carry out the state ordained electoral process and whether state officials have succumbed to 'temptations to control . . . elections by violence and corruption.' " *Id.*, at 453, quoting *Ex parte Yarbrough* (1884) 110 US 651, 666.

There can be no doubt that Plaintiffs' allegations meet this test. Intentional conduct has been pled, a traditional basis for expanding liability, *Prosser & Keeton on Torts*, 5d, §8 at 9.37, and the factual allegations show that it was no accident that Johnson and Wadsworth were ousted from the committee and replaced by a candidate they had trounced only months before – the same Laveta Stelzmiller who David Knowles had appointed to the Committee in 1993. CR 28 at ¶¶3 and 16. Defendants' longstanding animus against Johnson and Wadsworth, extending back to 1992, and their secrecy in preparing and presenting the new bylaws adopted in January, 1995, show a pattern of activity directed against Johnson, Wadsworth and those who twice voted them into office. In light of these allegations, it is hardly hyperbole to conclude Defendants readily succumbed to the temptation to

control the elections in El Dorado County through a gross form of political corruption.

Griffin v. Burns (CA1: 1978) 570 F2d 1065 also found federal intervention warranted in an election class action/§1983 case stemming from a public office primary. After reciting, at 1074-5, the caselaw protecting the fundamental right to vote, and repeating the admonition that federal courts should not endorse §1983 suits in "garden variety election irregularities," *id.*, at 1076, the court recognized that

> "the right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, *a violation of the due process clause may be indicated and relief under §1983 therefore in order*. . . . there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.
>
> In cases falling within such confines, we think a federal judge need not be timid, but may and should do what common sense and justice require." *Id.*, at 1077-8, finding both class action status and relief under §1983 appropriate. [emphasis added.]

Can it be seriously questioned that Defendants' ousting Johnson and Wadsworth from the Central Committee breached the federally protected right of their co-Plaintiffs/electors to have their votes count? Can Defendants seriously contend that a point of judicial intervention is *never* reached because of a barrier built by an allegedly private entity and its actors, regardless of whether 1, 2, 4, or 400 candidates or elections are nullified? The action

taken was fundamentally unfair since it violated a fundamental right. This Court should have no hesitation in finding state action and in allowing Plaintiffs to prove their claims at trial.

2. Defendants' Actions Satisfy the Joint Action Test

State action may also be shown by joint action between the state and a private party, where the private party is a "willful participant in joint activity with the State or its agents." *Howerton, supra,* at 383 and *Flagg, supra,* at 164-5, 98 SC 1737. "One way to establish joint action is to demonstrate a conspiracy between private parties and the government." CR 40 at 10:19-21.

Contrary to the district court's interpretation, however, a conspiracy can – and most do – run two ways. Private parties may be held liable under §1983 if conspiring with persons performing state action, *Adickes v. Kress* (1970) 398 US 144, 150-152, 90 SC 1598, 1605, even if conspiring with state actors who have immunity for their acts. *Cook v. Houston Post* (CA5: 1980) 616 F2d 791, 794. The pleadings and inferences reasonably flowing therefrom demonstrate how all Defendants conspired to oust Johnson and Wadsworth from the committee and to violate the voters' rights. CR 28, ¶¶3, 5, 7, 12-16 and 19. Whether Knowles or the committee members were the state actors and the other merely willing participants is irrelevant since it is only necessary for one group of Defendants to engage in state action to bind the other in conspiracy terms. The allegations of the amended complaint and the arguments advanced herein demonstrate

that *all* Defendants engaged in state action under the various tests for that component of Plaintiffs' case.

The joint action test may be met in other ways. Thus, if there is a symbiotic relationship between the state and the private party, state action may exist. *Moose Lodge No. 107 v. Irvis* (1972) 407 US 163, 175, 92 SC 1965, 1972. Such a relationship exists in the close interaction between the state and the central committees under the guidance of the CEC. From fielding candidates who are voted upon in an official, state sponsored and supervised primary election, to certifying the election results and administering the oath required of the winners in the primary, the state and the committees act jointly and willingly with each other in identifying and producing players in first the political and, ultimately if not concomitantly, in the governmental process. But for the primary, there would be no committee; but for the committee, there would be no republican state government, a dictatorship or lottery might function as well. Once formed, the committees may meet monthly in state-owned buildings free of charge and remain subject to state regulation in how they conduct their meetings and govern themselves. Clearly, in the matter of the elections that serve to form them, the activities of the committees and of the state are so inextricably intertwined that one could not exist without the other. And, where the outcome of those elections is voided by the a [sic] political creature who owes its political existence to this symbiotic system, that same state action justifies federal relief.

Nothing in *Flagg, supra,* is to the contrary. There, as elsewhere, the Supreme Court took care to distinguish election cases from the creditor's lien case before it for

purposes of state action analysis. *Id.*, at 158-164, 98 SC 1734-1736. In light of the Court's recent pronouncement and expansion of its views of state action in elections contexts in *Morse, supra,* reliance upon *Flagg, Moose Lodge, Jackson* and other non-election cases grappling with the state-private action continuum is especially inadvisable. Moreover, consideration of the "feature of exclusivity" common to the public function doctrine analyzed in *Flagg,* yields the predictable conclusion that "the conduct of the elections themselves is an exclusively public function," *id.*, at 158, 98 SC 1734, including any restrictions imposed upon that conduct by purely party procedures. *Morse, supra,* at 1194-1195, 1200-1205.

3. Defendants' Actions Satisfy the State Compulsion Test

The state compulsion test is the third method by which state action may be shown, although its application here is initially questionable since neither the State of California, nor any of its political subdivisions, is a defendant. (*Cf., Blum v. Yaretsky* (1982) 457 US 992, 102 SC 2777: Medicaid patients' suit against state social services commissioners.) Where applicable, state action may be found if a state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. . . . " *Id.*, at 1004, 102 SC 2786. [citations omitted.]

Of the cases relied upon by the Supreme Court in *Blum* in analyzing the state compulsion test, only *Moose Lodge* and *Adickes* were anti-Black discrimination cases similar to the anti-gay discrimination case at bar; neither

was ever cited by the district court in either of its orders dismissing Plaintiffs' suit. Review of these two decisions reveals that *Adickes* is the more similar to this appeal, an action not against a state but against allegedly private entities. There, the Supreme Court held that

> "for state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law – in either case it is the State that has commanded the result by its law." *Id.*, at 171, 90 SC 1615.

It must be recalled that Plaintiffs seek declaratory relief in their suit: that the bylaws adopted on January 9, 1995, are invalid and repugnant to the I and XIV Amendments. CR 28 at 22:18-20. Similarly, it is alleged that those bylaws, as written and enforced, were overbroad, vague and incapable of Constitutional comprehension, and their "enforcement against Plaintiff WADSWORTH under the provisions of CEC §§7250-7470 and 18540-18700 violated all Plaintiffs' I and XIV Amendment rights." CR 28 at ¶25. Thus, it has been alleged that Defendants, by relying upon these provisions of the CEC to justify their ouster of Wadsworth under bylaws adopted under the same authority, received at least covert, if not outright, encouragement from the state for their actions. And, even if Knowles' appointee Laveta Stelzmiller voted at a meeting the district court characterized as devoted to intra-party management, the effect of that vote – ouster of both Plaintiffs – was action that only the state could have enforced.

Indeed, as apparently inspired by CEC §7413, added in 1994, post-*Eu, supra,* the new CEC provided impetus for all Defendants' conspiratorial acts, first in amending their bylaws and then in ejecting Wadsworth from the committee under this grant of authority. It is reasonable to infer that without assurance that their actions would be backed up by the power of the state expressed in these provisions of the CEC, Defendants would, at least, not have acted as summarily as they did, if they had acted at all, to Plaintiffs' detriment.[4] That an alternative inference is available – Defendants' motivation was purely personal, as evidenced by the homophobic remarks of Knowles and Carlson – does not make the initial inference unreasonable or unsupportive of Plaintiffs' claims. *Everest & Jennings* and *Columbia, supra.*

4. Defendants' Actions Satisfy the Nexus Test

The final test for state action, the nexus test, is similar to, if not subsumed within, the public function and joint action tests. All of the previous factors showing the high degree of interaction between California and its county central committees through the provisions of the CEC apply with equal force here. Moreover, language from the seminal case developing the nexus test, *Burton v. Wilmington Parking Authority* (1961) 365 US 715, 81 SC 856, though not an election dispute, was quoted in *Gray v.*

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[4] (*Cf. Moose Lodge, supra,* at 179, 92 SC 1974: enforcement of "concededly discriminatory private rule" under neutral regulation "would violate the Fourteenth Amendment."

Sanders (1963) 372 US 368, 83 SC 801, and other voting rights cases:

> " 'We think these provisions [of Georgia's regulations for party primaries] show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusion of voters made by the party by the primary rules become exclusions enforced by the State.' " *Id.*, at 374, 83 SC 805, quoting *Chapman v. King* (CA5: 196) 154 F2d 460, 464; *cf.*, *Burton, supra*, at 725, 82 SC 862: the state "has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [private entity] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment."

This state action is especially obnoxious to the fundamental Constitutional right to vote when it results in a person who *lost* an election being subsequently appointed to replace those who *won* the same election, as occurred here when Laveta Stelzmiller replaced Wadsworth, who, like Johnson, had received more votes than she did in the June, 1994, primary election. CR 28, Ex. C. See, also, *Terry, supra*, at 463, 73 SC 820, recognizing political reality of a "private" county political association controlling "every county-wide official elected since 1889." That Stelzmiller was Assemblyman Knowles' one-time appointee to the

committee highlights the degree of Defendants' deprivation of Plaintiffs' rights.

Nothing in *Jackson, supra,* is to the contrary. That Supreme Court decision found no state action in a §1983 claim against a utility, not the state, and took pains to distinguish election disputes from the case before it. *Id.,* at 352, 95 SC 454. Here, all Defendants' took oaths obliging them to protect, defend and uphold the state and federal Constitutions and thus abide by the voters' will and governing law. Yet, supposedly mindful of their obligations by the oath they took to uphold them, Defendants acted under the CEC to violate, not protect, Plaintiffs' rights. For all these reasons, Defendants acted under color of state law.

II. PLAINTIFFS HAVE PLED DEPRIVATIONS OF CONSTITUTIONAL RIGHTS

In *Romer v. Evans* (1996) 116 SC 1620, the Supreme Court struck down an amendment to the Colorado constitution purporting to prevent any legislative, executive or judicial action designed to protect gays or lesbians from discrimination. In the first of two decisions, Colorado's Supreme Court had held the amendment subject to strict scrutiny analysis on the ground that "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process." *Evans v. Romer* (CO: 1993) 854 P2d 1270, 1282. Following remand, the Colorado Supreme Court overturned the amendment on its merits, which were found to be few. The concurring opinion of Justice Scott devoted

considerable discussion to the privileged position participation in the political process merits under our law. *Evans v. Romer* (CO: 1994) 882 P2d 1335, 1351-1356.

The U.S. Supreme Court affirmed the Colorado decision and agreed the amendment "infringed the fundamental right of gays and lesbians to participate in the political process." *Romer, supra,* at 1624. That the Supreme Court viewed discrimination against gays and lesbians in much the same light it saw discrimination against Blacks was clear from the beginning of its opinion, which quoted from *Plessy v. Ferguson* (1896) 163 US 537, 559: our Constitution "neither knows nor tolerates classes among citizens." *Romer, supra,* at 1623. Continuing its critique, the Supreme Court noted:

> "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*, at 1628.

In seeking relief under §1983, Plaintiffs pled violations of their fundamental Constitutional rights under the I and XIV Amendments of participating in the political process by voting and other means; of free speech, expression and association; of peaceably assembling; and of due process. The right to vote is a fundamental right which "is preservative of other basic civil and political rights," *Reynolds v. Sims* (1964) 377 US 533, 561-562, 84 SC

1064, 1071-72, and includes the right to have one's vote counted. *U.S. v. Mosley* (1915) 238 US 383, 386, 35 SC 904, 905. As noted in *Morse v. Republican Party of Virginia* (1996) 116 SC 1186, the Supreme Court rejected limiting the scope of the Texas "white primary cases" to racially-tinged election disputes. *Id.*, at 1201-6; see, *Terry, supra,* and *Smith v. Allwright* (1944) 321 US 649, 64 SC 757. "Generally speaking, the Supreme Court has required that parties be inclusive, allowing all interested persons to participate in party activities." *Republican Party of Arkansas, supra.*

Diverse decisions and courts recognize that

> "the struggle of the homosexual community for equal rights . . . must be recognized as a political activity. Indeed, the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. **The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women and other minorities.** (See, e.g., *Gay Students Org. of Univ. of New Hampshire v. Banner* (1st Cir. 1974) 509 F2d 652, 657; *Acanfora v. Board of Education of Montgomery County* (4th Cir. 1974) 491 F2d 498, cert. den., 419 U.S. 836 [42 L.Ed.2d 63, 95 S.Ct. 64]; *Aumiller v. University of Delaware* (D.Del. 1977) 434 F.Supp. 1273, 1292-1302.) [emphasis added.]

Consequently, one important aspect of the struggle for equal rights is to induce homosexual

> individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights." *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 C3d 458, 488. *Cf.*, the concurrence of Judge Norris in *Watkins v. US Army* (CA9: 1989) 875 F2d 699, 727.

No better definition of political activity can be found and the longstanding efforts of Johnson and Wadsworth along those lines provide no better evidence of what got them elected to the committee, whose electors knew both these Plaintiffs' politics and orientation and endorsed them with their votes.[5] Conversely, no better example of bigoted, spiteful prejudice can be found than in Defendants' record of harassment that culminated in the ousters of Johnson and Wadsworth from the Committee and their replacement with a one-time Knowles' appointee who *never* received the voters' approval. Just as in cases of racial bias, *Palmore v. Sidoti* (1984) 466 US 429, 433 held:

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

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[5] CR 28, ¶¶ 6, 7, 10, 12-16 and 25-28, and see Exhibit C thereto, which shows that Ms. Colvin, who received the most votes in the 1994 election, twice voted against ouster. Note also that Mr. Gilmore, the second highest votegetter, also voted against ouster. Of the 1994 candidates elected, only John Stelzmiller, Laveta's husband, twice voted to oust. Significantly, he also received the fewest votes of the five candidates who were elected in 1994.

Given that both the right to vote and participate in the political process and the right to speak freely are fundamental rights, any discrimination against either must be tailored to serve a compelling state interest. Unlike the military cases, there is no need to show deference to some other policy or branch of the government: this case involves only speech and politics. There can be no justification – rational or compelling – for Defendants' actions in removing Johnson and Wadsworth from the positions to which they were elected. There can only be constitutional condemnation for Defendants' infringement of all Plaintiffs' fundamental speech and political rights. As the district court noted in a different context in *Dahl v. Secretary of the Navy* (ED, CA: 1993) 830 FS 1319, 1331:

> "[P]olicies based on or motivated by the prejudice of one group toward another do not further any conceivable legitimate government interest and must be deemed irrational as a matter of law."

As stated in *Cohen v. California* (1971) 403 US 15, 24: "the premise of individual dignity and choice upon which our political system rests" is the sort of speech protected. It does not stretch to suggest that requiring Wadsworth to trade his individual dignity as expressed in his sexual orientation for the right to exercise his rights of free speech and political involvement asks, both in Constitutional and in personal terms, simply too much. See, *Able v. US* (ED, NY: 1995) 880 FS 968, 972-980.

Johnson's and Wadsworth's rights were not the only ones violated; those of each and every registered Republican who voted for them in the 1992 and 1994 primary

elections were also jeopardized in a manner that cannot be reconciled with strict scrutiny. Specific facts have been pled showing that Defendants applied a double standard to Johnson and Wadsworth: Defendant Schumacher might jointly own property with, and rent it to, registered Democrats, but Plaintiffs could not; public and private criticism of Johnson and Wadsworth was permitted, but of the committee [sic] was not. CR 28 at ¶16. For all these violations of Plaintiffs' fundamental right to participate in the political process relief should be made available by allowing their §1983 action to proceed.

CONCLUSION

Plaintiffs' amended complaint more than adequately alleges invasions of fundamental Constitutional rights relating to free speech, due process and participation in the political process by Defendants' pattern of activity that culminated in their twice ejecting Johnson and Wadsworth from the elected office to which they had been twice returned. All Defendants' actions constituted state action under any one of the four tests for that necessary component of a 42 USC §1983 claim. The Court should reverse the decision of the district court and remand for trial on the merits.

DATED: August 19, 1996

LAW OFFICES OF G. MICHAEL GERMAN, APC

/s/ G. Michael German
Attorney for Plaintiffs/
Appellants

STATEMENT OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32e4, I certify that Plaintiffs'/Appellants' Opening Brief is monospaced, has 10 characters per inch, contains 10,825 words and does not exceed 40 pages.

DATED: August 19, 1996

LAW OFFICES OF G. MICHAEL GERMAN, APC

/s/ G. Michael German
Attorney for Plaintiffs/ Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2, Plaintiffs/Appellants PAUL JOHNSON, KEVIN WADSWORTH, LAUREN COOPER, RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated, advise the Court that they know of no cases related to this appeal presently pending before this or any other federal court. Plaintiffs'/Appellants' state law claims contained in their action now on appeal herein were timely filed in the Superior Court of California, in and for El Dorado County, pursuant to 28 USC §1367d, where they are now stayed pending resolution of the instant federal appeal. Exs. A and B to Addendum.

DATED: August 19, 1996

LAW OFFICES OF G. MICHAEL GERMAN, APC

/s/ G. Michael German
Attorney for Plaintiffs/ Appellants

NINTH CIRCUIT CASE NO. 96-15852
E. D. CALIFORNIA CASE NO. CIV-S-95-835 MLS (PAN)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHNSON; KEVIN WADSWOTH; LAUREN COOPER; RAY SEBASTIAN and BARBARA SEBASTIAN, individually and on behalf of all others similarly situated

Plaintiffs/Appellants

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS

Defendants/Appellees

DEFENDANTS/APPELLEES' ANSWERING BRIEF

Appeal from the United States District Court
for the Eastern District of California
The Honorable Milton L. Schwartz

MARJORIE E. MANNING, SBN 118643
T. D. BOLLING, JR., SBN 33236
BOLLING, WALTER & GAWTHROP
8880 Cal Center Drive, Suite 400
Sacramento, California 95826
916/369-0777

Attorneys for Defendants/Appellees

REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs have appealed from the judgment of the district court following dismissal of their first amended complaint without leave to amend. Jurisdiction in the district court was based on 28 U.S.C. sections 1331, 1343, 1357, 1367 and 2201. Jurisdiction in this Court is appropriate pursuant to 28 U.S.C. section 1291, as the appeal is taken from the district court's final decision.

REQUEST FOR ATTORNEYS' FEES

Pursuant to Ninth Circuit Rule 28-2.3, defendants advise they will seek recovery of attorneys' fees in this appeal pursuant to 42 U.S.C. section 1998, *United States, ex rel. Chunie v. Ringross*, 788 F.2d 638, 647 (9th Cir. 1986), cert. den. 479 U.S. 1009 (1986), and the inherent power of this Court.

STATEMENT OF ISSUES FOR APPELLATE REVIEW

1. Does a private political committee's removal of a member for conduct it deems injurious to the committee constitute "state action"?

2. Does a state assemblyman's mere presence as a ex-officio member on a private political committee render the committee's decisions "state action"?

3. Does the recognized right of political parties to govern their internal affairs without state interference encompass the right to remove committee members whose actions it deems injurious to the Party/

4. Does the United States Constitution embody a fundamental right to membership at the managerial level of a political committee?

SUMMARY OF THE ARGUMENT

Despite its captivating label, this is not a case involving the deprivation of civil rights. It is a dispute between warring factions of a political party over internal management, platform, and basic ideology. The defendants are the Republican Central Committee of El Dorado County ("Committee"), a subsection of the California Republican Party, and a number of its members including Assemblyman David Knowles (an ex-officio member). Plaintiffs Johnson and Wadsworth are ex-members of the Committee who were ousted from their positions for conduct deemed injurious to the Committee. That ouster, according to plaintiffs, amounts to an impermissible deprivation of fundamental constitutional protections.

They also complain defendants' conduct was based in part on plaintiffs' status as homosexuals.

In the face of established United States Supreme Court authority recognizing political parties as autonomous private organizations entitled to manage their internal affairs without interference by the state, the district court granted defendants' motions to dismiss. That ruling was entirely correct. No section 1983 claim has been or could be stated under these circumstances. First, the Committee and its members are private actors. Second, plaintiffs have not been deprived of any federally protected right. Finally, disputes concerning the internal management of political parties, however phrased, are beyond the reach of the courts.

STATEMENT OF THE CASE

A. Factual Allegations of First Amended Complaint

The complaint alleges plaintiffs are homosexual males who have been registered members of the Republican Party for approximately ten years. CR 28, ¶¶ 6, 7.[1] In June 1992 and June 1994, they were elected to two-year terms on the Committee in a Republican Primary in El Dorado County. CR 28, ¶ 7.

Thereafter, Johnson entered into an agreement to lease for $100 property owned by him and Wadsworth

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[1] Appellants' opening brief uses the designation "CR" (presumably "court record") to refer to the district court record. To maintain continuity, the same designation will be used herein.

(the Lone Antler Ranch) to the "Katie Hirning for Congress Campaign." CR 28, ¶¶ 8, 9. The lease secured a location for a fundraiser for Ms. Hirning, the Democratic candidate for the November 1994 Fourth Congressional District election in which she opposed incumbent Republican John Doolittle. CR 28, ¶ 9.

On September 12, 1994, at a regularly scheduled meeting of the Committee, defendant Emigh initiated discussion of Johnson's and Wadsworth's roles in the Hirning fundraiser, and proposed that both be removed from the Committee for failing to support Republican candidates and for providing support to Democratic candidates. The motion passed 13 to 1 with 3 abstentions. CR 28, ¶ 11, 12. Thereafter, Johnson "reregistered as a Democrat." CR 28, ¶ 13.

On January 9, 1995, a meeting of the Committee was held pursuant to notice mailed to all members. CR 28, ¶ 14, 15. Wadsworth was sworn in as a member of the Committee and officers were elected. *Id.* Bylaws were presented for adoption over Wadsworth's objection on the ground of inadequate notice. *Id.* The bylaws were then approved and adopted by the Committee. *Id.* Defendant Emigh announced at this meeting that he intended to seek Wadsworth's removal at the next Committee meeting, which was set for February 13, 1995. CR 28, ¶ 15.

On February 6, 1995, all members were mailed notice of the February 13 meeting, along with an agenda which indicated "Disciplinary Action" would be among the matters considered. CR 28, ¶ 16. At the February 13 meeting, which was attended by Wadsworth, a motion

was made and seconded that Wadsworth be removed "for engaging in actions deemed injurious" to the Committee. *Id.* Stated grounds for removal included Wadsworth's public criticisms of the Committee and his support of Democratic candidate Katie Hirning, as evidenced by a letter from her to Wadsworth, which he claimed not to have seen. *Id.* Wadsworth was removed by a vote of 9 to 3 with one abstention. He was among those voting "No."*Id.*

Defendant Knowles is an ex-officio member of the Committee by virtue of his status as a Republican Assemblyman. CR 28,¶ 3. Knowles did not vote on Wadsworth's removal and the complaint does not allege he was present at the February 13 meeting. CR 28, ¶ 16. However, the complaint alleges Knowles told defendant Schumacher that he encouraged Wadsworth's removal because of his homosexuality. CR 28 ¶ 16. Plaintiffs also claim Knowles and defendant Carlson discussed removal of Wadsworth on that ground. *Id.*

In addition to asserting their individual claims, Johnson and Wadsworth purport to represent the interests of a class defined as all Republican in El Dorado County supervisorial District III who voted for them in the 1992 and 1994 party primaries. CR 28, ¶ 21. The complaint concludes the entire class would benefit from an award of monetary damages and a declaration the Committee's bylaws adopted in 1995 are unconstitutional, which allegedly would allow Wadsworth to be reinstated. CR 28, ¶ 22.

B. Procedural History

Plaintiffs initiated this action by filing their original complaint in United States District Court, Eastern District of California, on May 8, 1995. CR 1. Included in the complaint were counts alleging violation of civil rights pursuant to 42 U.S.C. sections 1983, 1985(3), and 1986. In essence, plaintiffs asserted they were punished for "stands they took," deprived of the fundamental right to vote (along with "class members" theoretically similarly situated), and afforded disparate treatment as homosexuals. *Id.* The complaint also sought a declaration that the Committee's bylaws were vague, overly broad and unconstitutional. *Id.*

Defendants moved to dismiss all of plaintiffs' federal claims on the grounds no basis for state action had been pled, no deprivation of fundamental rights had been identified, and judicial interference in the internal management of the Party was impermissible pursuant to controlling authority. CR 6, 15. The district court granted the motions, expressed doubt a viable constitutional claim could be pled under these circumstances, but granted plaintiffs leave to amend to attempt to state a section 1983 claim based on First and/or Fourteenth Amendment violations. The court stressed any such amendment should not rely on the fundamental right to vote because interference with an election was not claimed and plaintiffs' ouster was from party office, not a public office CR 24, 26.

Plaintiffs filed a first amended complaint thereafter which, apart from deleting a claim under 42 U.S.C. section 1985(3), corrected none of the deficiencies in the

original pleading.[2] Defendants again moved to dismiss on essentially the same grounds asserted previously. CR 28, 33, 34. The district court granted the motions without leave to amend, ruling no wrongful conduct was alleged under color of state law. CR 38, 40. Since the complaint failed to satisfy even the first prong of a section 1983 claim, the court did not address the substantive basis of the alleged constitutional claims. CR 40.

STANDARD OF REVIEW

De novo review of a district court's dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is proper. *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 501 (9th Cir. 1996). The court accepts as true all material allegations in the complaint and reasonable inferences drawn therefrom, and construes the pleading in the light most favorable to the plaintiff. *N.L. Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Northstar International v. Arizona Corporation Commission*, 720 F.2d 578, 580 (9th Cir. 1983). However, conclusory allegations of law and unwarranted inferences are insufficient to sustain the pleading. *In re Verifone Securities Litigation*, 11 F.3d 865, 868 (9th Cir. 1993).

Similarly, the mere contention a constitutional violation has occurred is insufficient to raise a colorable claim to provide subject matter jurisdiction. *Robertson v. Bowen*, 803 F.2d 808, 810 (5th Cir. 1986); *Holloway v. Schweiker*, 724

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[2] Plaintiffs have abandoned their claim under 42 U.S.C. section 1985(3) as it is not addressed in their brief. *Officers for Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725-726 (9th Cir. 1992).

F.2d 1102, 1105 (4th Cir. 1984), *cert. den.* 467 U.S. 1217 (1984). Instead, the court must focus on the factual allegations in the complaint and determine not only that the plaintiff has described a legitimate constitutional right at stake, but also that unconstitutional conduct by the state deprived the plaintiff of that right. *Collins v. Harker Heights*, 507 U.S. 115, 124, 117 L.Ed.2d 261, 273 (1992). If such facts are absent, dismissal is appropriate. The court may not assume the plaintiff "can prove facts that it has not alleged or that the defendants have violated [the law] in ways that have not been alleged." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526, 74 L.Ed.2d 723, 731 (1983).

ARGUMENT

I. THE COMPLAINT DOES NOT ALLEGE ACTIONABLE CONDUCT UNDER COLOR OF STATE LAW

A plaintiff seeking relief under 42 U.S.C. section 1983 must allege facts showing the defendant, while acting under color of state law, caused the deprivation of a federal right. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). This "state action" requirement, which is designed to ensure that the challenged conduct is fairly attributed to the state, contains two components:

> "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a State actor."

Fred Meyer, Inc. v. Casey, 67 F.3d 1412, 1414 (9th Cir. 1995).

Although their brief is less than clear, it appears the State-created right on which plaintiffs rely for meeting the first prong of the state action test is California Elections Code ("CEC") section 7413, which provides:

> "A committee may remove any member, other than an ex-officio member, who during his or her term of membership affiliates with, or registers as a member of another party, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party."

Without even considering whether the complaint adequately pleads a deprivation caused by the exercise of rights under section 7413, it is clear the second prong of the state action test cannot be satisfied because plaintiffs target conduct by *private* actors only. While there are exceptions to the general rule prohibiting section 1983 actions against private individuals, this case is not one of them.

A. Controlling Law Recognizes Political Parties and Their Members As Private Actors

It has long been recognized that political parties are private organizations. *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 825-826 (9th Cir. 1987) ("Eu I")., *March Fong Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 103 L.Ed.2d 271 (1989) ("Eu II"); *California Republican Party v. Mercier*,

652 F.Supp. 928, 934 (C.D. Cal. 1986). Plaintiffs correctly observe the Committee is regulated by the California Elections Code. However, even heavy regulation of private organizations does not transform their conduct into "state action." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358, 41 L.Ed.2d 477, 488 (1974). As this Court recognized nearly a decade ago:

> "Even if the California elections Code had expressly characterized the committees as public agencies, we would reject the State's premise that a state can strip a voluntary political association of First Amendment rights by legislating it into an arm of the State."

Eu I, supra, 826 F.2d at p. 825.

The same conclusion has been drawn by the California Supreme Court: "The functions of party committee members remain those of their particular political party and do not involve the exercise of the sovereign power of the public. . . . Thus, the courts have recognized that party county central committee membership is in reality an office of a political party." *Moore v. Parrish*, 32 Cal.3d 535, 545 (1982).

B. The Public Function Doctrine Cannot Be Invoked to Transform the Committee's Private Actions into State Action

Plaintiffs assert that the Committee is a political organization operating by virtue of the California elections Code, which mandates the manner in which primary elections must be noticed, organized, conducted, supervised and officially reported. That allegation is true,

but irrelevant. The public function doctrine recognizes that if a state delegates to a private party a power traditionally reserved exclusively to the state, the exercise of that power constitutes state actions. *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157-158, 56 L.Ed.2d 185, 194 (1978). However, the complaint does not allege a constitutional deprivation caused by improper noticing, organizing, conducting, supervising or reporting of an election.

Furthermore, the mere fact committees are authorized to conduct party primaries does not render them state actors for all purposes. As this Court acknowledged, the United States Supreme Court will not supplant the private status of political parties merely because some of their activities are integral to the state-created election process. *Eu I, supra,* 826 F.2d at p. 826, fn 21.

Other jurisdictions are in accord. In *Federspiel v. Ohio Republican Party,* 867 F.Supp. 617 (S.D. Ohio 1994), the court held that neither a state central committee's handling of internal disputes in violation of its own rules nor the intra-party election of officers constitutes state action. *Id.* at pp. 622-623. The same sentiment was echoed in *Blank v. Heineman,* 771 F.Supp. 1013 (D. Neb. 1991), wherein offices of a county political party filed a civil rights action alleging they were wrongfully ousted by the party's executive committee under the pretext of inadequate performance, when in fact removal was motivated by their status as "evangelical christians." In opposing the defendants' motion to dismiss, the ousted members reasoned their removal was tantamount to state action due to the same indirect effect on the electorate Johnson and Wadsworth urge in this action. The district court disagreed:

> "The Court finds plaintiffs' argument which attempts to 'bootstrap' and transform actions relating solely to the internal activity of a political party into activity which constitutes state action to be unpersuasive. Simply stated, the plaintiffs' argument, carried to its logical extension, would transform *any* action of a political party involving internal affairs into state action. Courts generally and consistently have been reluctant to interfere with the internal operations of a political party. [Citations.]"

Id. at p. 1018, italics in original.

Finally, in *Bancy v. The Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), newly elected precinct executives filed suit after party officials prohibited them from participating in a ward chairman election, ostensibly because they were sympathetic to the right-to-life movement. Despite the fact Ohio law authorized the executive committee to fill vacancies which occurred in *County* offices, the Sixth Circuit held that elections to *party* office do not qualify as state action, whatever other authority the committee might possess:

> "The plaintiffs also suggest that since Ohio law mandates that the party elect an executive committee, the election itself is under color of state law. Again, we disagree. Initially, we express grave doubts that the statute is enforceable in light of the Supreme Court's recent decision in *Eu v. San Francisco County Democratic Central Committee* [citations], . . . Further, merely because the Republican Party has chosen to do something that the state has required them to do

> does not mean that the voluntary action of the party becomes state action."

Id. at p. 1195.

These cases reflect two general rules pertinent to the public function doctrine. First, the fact a party functions as a state actor for the purpose of conducting a general election does not render it a state actor for all purposes. *Eu I, supra.* Second, conducting an election is a public function only if it will produce "the uncontested choice of *public* officials." *Flagg Bros. Inc., supra,* 436 U.S. at p. 158, 56 L.Ed.2d at pp. 194-195, emphasis added.

Plaintiffs attempt to obscure both rules. They cite *Gamza v. Aguirre,* 619 F.2d 449 (5th Cir. 1980) and *Griffin v. Burns,* 570 F.2d 1065 (5th Cir. 1978) for the contrary proposition. However, both cases involved direct state interference with the right to vote in an election for public office. Even *Republican Party of Arkansas v. Faulkner County, Arkansas,* 49 F.3d 1289 (8th Cir. 1995), cited by plaintiffs at pages 20 and 23 of their brief, recognized this distinction:

> "The Court established that where the party nomination process is integral to the selection of *public* officeholders the party activities must be considered state action."

Id. at p. 1292, emphasis added.

In their admission of the absence of pertinent authority to support them, plaintiffs finally urge the "public office/private post distinction should not control here." AOB 24-25. That argument is tantamount to requesting this Court ignore the state action requirement altogether, which would be clear error. "Careful adherence to the

'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 73 L.Ed.2d 482 (1982).

C. The Joint Action Test Cannot Be Invoked to Transform the Committee's Private Actions into State Action

Private individuals may be regarded as acting "under color of state law" if they act as wilful participants with the state or its agents in effecting a constitutional deprivation. *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983). Under this test the pivotal factor is not the *status* of the state's agent as such, but rather, the requisite causal link between his state-created official duties and the alleged deprivation. *Dang Vang v. Vang Xiong X Toyed*, 944 F.2d 476, 479 (9th Cir. 1991). In other words, in order for the private party to be liable for joint action with a state actor, the latter must be acting under color of state law. One acts under color of state law for section 1983 purposes only "if he 'exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Anthony v. County of Sacramento Sheriff's Dept.*, 845 F.Supp. 1396, 1400 (E.D. Cal. 1994), quoting *West v. Atkins*, 487 U.S. 42, 49, 101 L.Ed.2d 40 (1988).

Johnson and Wadsworth claim to have satisfied the state action requirement based on purported cooperative efforts between Assemblyman Knowles and other Committee members. Specifically, they contend Knowles used

his appointment power to influence Committee members to vote against Wadsworth's proposed platform and thereafter to effect plaintiffs' ouster. However, the appointment power to which the complaint refers is not derived from Knowles' status as a legislator. It is a power which exists by virtue of Knowles' *membership on the Committee,* and is shared by every other member of the Committee. CEC section 7406 provides that a committee "may authorize each elected member and each ex-officio member of that committee to appoint an alternate member" who "must meet the same qualifications as the regular member, and may vote only in the absence of the member who appointed him or her." Thus even if the complaint alleged facts showing a link between Knowles' appointment power and a deprivation of plaintiffs' rights, the power in question is not derivate of or tantamount to his official state duties; it is a function of his membership in a *private* organization.

As a substitute for wrongful conduct caused by the exercise of official duties, plaintiffs suggest the power of Knowles' office was so awesome that the remaining defendants succumbed to his influence. AOB 16-17. This speculative scenario, they claim, is analogous to the facts of *Dang Vang, supra,* in which a social worker's rape of a refugee under the guise of employment opportunity counseling was deemed conduct under color of state law. 944 F.2d at p. 480. Apart from the absurdity inherent in likening a state social worker's rape of female refugees to politicians' attempts to influence each other, the rationale underlying *Dang Vang* does not support the proposition advanced. In order for a state employee's acts to be "under color of law," they must be under the "pretense"

of some state law. "The pretense is lacking if the wrongful act is 'not in any way related to the performance of the duties of the state employee.' [Citations]." *Id.* at p. 479. Here, it is not alleged Knowles used his government position to influence or control *plaintiffs*. Nor are any facts pled which suggest Knowles was "clothed with the legitimacy of the government" or purporting to act thereunder. *Laxalt v. McClatchy*, 622 F.Supp. 737, 747 (D. C. Nev. 1985), citing *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985). The mere fact one is an assemblyman does not automatically convert a demand for action into an official act, unless some further power of the office backs up that demand. *Id.* at p. 748.

Equally unavailing is plaintiffs' claim that because it was Knowles' obligation as an assemblyman to "respect, defend and uphold" the will of the electorate, contrary conduct somehow reflects use of his "office." AOB 18. "Unlike the sovereign, party central committees are expected to serve party interests, not the interest of the public at large." *Eu I, supra*, 826 F.2d at p. 826, fn 20. Knowles' role as a member of the Party, as opposed to his role as a member of the Assembly, is merely highlighted by the proposition plaintiffs advance. The complaint says nothing about Knowles' performance of his duties *as a public official*.

Finally, adoption of plaintiffs' tortured "state action" theory would effectively force every state employee to relinquish an active role in party affairs or risk being subjected to section 1983 liability irrespective of whether his or her conduct was realistically attributable to the state. Except for the individual at the very lowest rung of the ladder, there is always someone in the hierarchy of

state government with more power than someone else, and thus (theoretically) a greater potential to influence. Subjecting the "influencer" to liability for votes or expressions of opinion concerning party ideology would open the floodgates of "civil rights" litigation without any consideration for the rights of the speaker or the principles which underlie the state action requirement.

D. The State Compulsion Test Cannot Be Invoked to Transform the Committee's Private Actions into State Action

Plaintiffs cite *Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142 (1970) for the proposition the Committee and its members acted under color of state law because the state so coerced and/or encouraged their wrongful conduct that it should be deemed conduct of the state. AOB 31. *Adickes* was a race discrimination case filed by a caucasian teacher who was refused service in a Mississippi restaurant because she was accompanied by black students. Upon departing the restaurant, she was arrested by the local police on a trumped up charge of vagrancy. Her subsequent section 1983 action against Kress (the department store in which the restaurant was located) alleged violation of her constitutional right to equal protection of the laws, based on a custom in the community to segregate races in public restaurants. She also alleged refusal of service and her subsequent arrest were the product of a conspiracy between the store and the police. *Id.* at p. 147, 26 L.Ed.2d at p. 148.

On certiorari, the United States Supreme Court ruled the plaintiff could state a viable section 1983 claim if she

proved the denial of service resulted from a state-enforced custom requiring racial segregation. *Id.* at p. 148. The Court did state, as indicated at page 31 of appellants' brief, that it makes no difference for state action purposes whether a private party's unconstitutional conduct is compelled by statute or custom amounting to the force of law. However, the *true* context in which that statement was uttered is quite different from that suggested by plaintiffs. The Court said:

> "In *Baldwin v. Morgan, supra,* the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do so.*' [Citations.] We think the same principle governs here.
>
> "For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law – in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgement of her equal protection right, if she proves that Kress refused her service because of

> a state-enforced custom of segregating the races in public restaurants."

Id. at p. 171, 26 L.Ed.2d at pp. 161-162.

Unlike the scenario in *Adickes*, plaintiffs' complaint does not identify any statute, custom or order which compelled or encouraged the Committee's allegedly discriminatory or otherwise unconstitutional conduct. Plaintiffs point to California Elections Code sections 7413 and 7443. The former provides a party committee "may" remove any member other than an ex-officio member who affiliates with, supports, or avows a preference for a candidate of another party. Section 7443 provides the committee shall perform any other duties and services for the party as are deemed to be for its benefit. Neither statute mandates or condones discrimination. While removal is mentioned, mere statutory authorization to remove a committee member cannot be equated with state action. *Melara v. Kennedy*, 541 F.2d 802, 804, 806 (9th Cir. 1976). See also *Federspiel v. Ohio Republican Party, supra*, 867 F.Supp. at p. 622, holding that "authorization to resolve internal party disputes does not make the party and the state intertwined such that actions of the party are 'state action.' " As this Court recently observed in *Mathis v. Pacific Gas and Electric Company, supra*, 75 F.3d at p. 501:

> "For better or worse, almost everyone these days occasionally acts under the influence of government regulations. But normally, it's only governmental actions, taken in the name of the public, backed by the threat of organized force, and financed with tax dollars, that are subject to

> constitutional requirements, including procedural fairness and equal protection. While we sometimes treat acts of private parties as public, we do so sparingly."

Not one of the characteristics of governmental action recognized in *Mathis* is present here.

E. The Nexus Test Cannot Be Invoked to Transform the Committee's Private Actions into State Actions

If there is a sufficiently close nexus between the state and the challenged actions of a private party, such that the action of the latter may fairly be treated as that of the state itself, private acts can qualify as state action. *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at p. 351, 42 L.Ed.2d at p. 484. The only "nexus" between the state and the defendants in this case lies in the complaint's assertion that Knowles' and the Committee's offices are in the same building, the Committee benefits government by providing it with a pool of experienced politicians, and at least some of the challenged conduct was authorized by state law. The latter allegation was addressed above. The remaining allegations are woefully inadequate the [sic] satisfy the "nexus test."

The hallmark of the symbiotic relationship between the state and private actors which occasionally satisfies the state action requirement is the rendering of mutual benefits. The seminal case addressing the issue was *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 6 L.Ed.2d 45 (1961), in which owners of a restaurant, which leased space in an automobile parking building owned by

the state, refused to serve blacks. The key to the result in *Burton* was "that the state had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at pp. 357-358, 42 L.Ed.2d at p. 488.

With more than a little creative license in citations to authority, the opening brief merges quotations from two cases to make them appear as one. AOB 33. The result is an impression that *Gray v. Sanders,* 372 U.S. 368, 9 L.Ed.2d 821 (1963) supports the proposition a state's cooperation with the party in conducting primary elections renders the two entities interdependent within the meaning of *Burton.* Actually, only the first half of the quoted excerpt on page 33 of plaintiffs' brief is taken from the text of *Gray,* which addressed a challenge to the state's use of counting, tabulating and consolidating votes in a primary election for *statewide* office. *Id.* at p. 370, 9 L.Ed.2d at p. 824. The second half of the quoted excerpt at page 33 of plaintiffs' brief is from the decision in *Burton,* which did recognize a symbiotic relationship between the state and a private entity, but *not* in the context of any political activity.

The extent to which plaintiffs have distorted the *Burton* rationale is further exemplified by the following statement in their brief: "But for the primary, there would be no committee; but for the committee there would be no republican state government." AOB 29-30. Plaintiffs might well have said: "But for state law, there would be no primary in which to vote; but for the primary, there would be no one to elect; but for the existence of elected officials, there would be no laws; therefore, each person

who votes is facilitating the passage of laws and is thus a state actor." Not only is the premise absurd, it ignores reality. The Committee manages the *Party* at the county level. It is *not* the county government; nor does it function as such.

II. EVEN IF THE CONDUCT OF WHICH PLAINTIFFS COMPLAIN COULD BE CONSTRUED AS STATE ACTION, NO DEPRIVATION OF A CONSTITUTIONAL RIGHT IS PLED

The constitutional basis for plaintiffs' civil rights action is no clearer now than it was when the district court granted defendants' first motions to dismiss. The Summary of Argument at page 11 of the brief refers to the "federally protected right to participate equally in the political process," which plaintiffs falsely claim was recently confirmed by the United States Supreme Court. The conclusion mentions due process and free speech. AOB 39. In the argument portion of their brief, plaintiffs highlight discrimination against homosexuals, which they claim (again falsely) the Supreme Court equates with discrimination against blacks. AOB 35. In the next breath they charge violations of freedom of association, peaceable assembly and the right to vote. *Id.* Finally, at page 32, they claim *all* their Fourteenth Amendment rights were violated. Plaintiffs have not bothered to identify with any degree of specificity the nature of their constitutional claim, and have assiduously avoided analysis of the Supreme Court decisions relevant to this case. Nevertheless, each of these subjects will be addressed.

A. The Internal Management Decisions of Political Parties Cannot Be Subjected to Judicial Review Under the Guise of Civil Rights Litigation

The rights of political parties to govern their internal affairs have evolved through four primary Supreme Court decisions. In *Cousins v. Wigoda*, 419 U.S. 477, 42 L.Ed.2d 595 (1975), the United States Supreme Court addressed the competing claims of two delegations to the 1972 Democratic National Convention. The "Wigoda delegates" had been elected in an Illinois Democratic primary. The "Cousins delegates" were later chosen at private caucuses after Party officials decided election of the Wigoda group violated Democratic guidelines and thus should be ignored. Two days before the Convention opened, the Wigoda delegates obtained an order from the Cook County Circuit Court enjoining the Cousins group from acting as delegates. Nevertheless, the Convention seated the Cousins delegates in favor of the Wigoda group. The Illinois appellate court affirmed the injunction, reasoning the Wigoda delegates were elected pursuant to state law, and "[t]he interest of the state in protesting the effective right to participate in primaries is superior to whatever other interest the Party itself might wish to protect." *Id.* at p. 482, 42 L.Ed.2d at p. 600. The Illinois Supreme Court affirmed.

The United States Supreme Court granted certiorari and reversed. After observing the Democratic Party enjoyed a constitutionally protected right of political association and *"any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents"* (*id.* at p. 488, 42 L.Ed.2d at p. 603; emphasis added),

the Court held the State's asserted interest in protecting votes cast at a primary, while legitimate, was not compelling and did not justify the injunction's abridgement of the Party's protected right of association. *Id.* at pp. 488-489, 42 L.Ed.2d at pp. 604-605.

Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 67 L.Ed.2d 82 (1981) also arose from a challenge to the Party's decision to ignore delegates chosen in a state primary election. The charter of the Democratic Party provided delegates to its convention could not be members of any other political party. Wisconsin's delegates were *chosen* at Party caucuses, but were bound under state law to cast their votes at the convention in accord with the results of the Wisconsin *open* primary. After the Democratic National Party announced it would not recognize the elected Wisconsin delegation, the State Supreme Court entered a judgment declaring the primary election constitutional and the results binding on the Party.

The United States Supreme Court reversed. It held that while Wisconsin's choice to hold an open primary might withstand constitutional scrutiny, the same could not be said of the State's attempt to bind the Party to the results of that election. Since *"freedom to associate for the 'common advancement of political beliefs' . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only"*, the Court deemed irrelevant Wisconsin's argument that its law placed only a minor burden on the Democratic Party:

> " . . . But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, *a State, or a court, may not constitutionally substitute its own judgment for that of the Party.* A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution and as is true of all expressions of First Amendment freedoms, *the courts may not interfere on the ground that they view a particular expression as unwise or irrational."*

Id. at pp. 123-124, 67 L.Ed.2d at p. 96, emphasis added.

The issue was examined from a different perspective in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 93 L.Ed.2d 514 (1986), in which plaintiffs launched a constitutional challenge to a state statute which precluded open primaries. The state Republican Party, which had recently adopted a rule allowing independents to vote in federal and state primaries in an attempt to broaden its support base, argued the statute impermissibly burdened the right of the Party to choose for itself the best means of achieving political success. The State argued its statute was designed to preserve the integrity of political parties, and pointed to past Supreme Court decisions upholding similar laws designed to prevent "raiding" (*Rosario v. Rockefeller*, 410 U.S. 752, 36 L.Ed.2d 1 (1973)), and "unrestrained factionalism" (*Storer v. Brown*, 415 U.S. 724, 39 L.Ed.2d 714 (1974)).

The Supreme Court struck down the statute as unconstitutional, noting the state can play no role in evaluating the wisdom of the Party's decision to depart from its tradition of holding closed primaries. It

explained that past decisions such as *Rosario* and *Storer* upheld statutes designed to protect political parties from *external* destruction, and could not be invoked to justify state interference with the political party's *internal* efforts to achieve political success:

> "We have previously recognized the danger that 'splintered parties and unrestrained factionalism may do significant damage to the fabric of government.' [*Storer v. Brown*] . . .
>
> "The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. *This protection,* like that accorded to parties threatened by raiding in *Rosario v. Rockefeller . . . , is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates.* The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. *In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself."*

Id. at pp. 223-224, 93 L.Ed.2d at p. 529; emphasis added.

The freedom of political associations to determine the means to best advance their political goals was the source of this Court's decision invalidating numerous provisions of the California Elections Code in *San Francisco County Democratic Central Committee v. March Fong Eu, supra,* 826

F.2d 814. Among the plaintiffs in *Eu* were county central committees of the Democratic and Republican parties who sought (via declaratory and injunctive relief) to vindicate their constitutional right to endorse candidates in direct party elections and to conduct their internal affairs without interference by the state. This Court held that any interference with "the parties' right to govern themselves as they think best" implicates First Amendment freedoms:

> " . . . Because *the right of association would be hollow without a corollary right of self-governance,* 'there must be a right not only to form political associations but to *organize and direct them* in the way that will make them most effective.' *Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567, 585 (D.C. Cir. 1975), cert. denied, 424 U.S. 933 [parallel citations omitted]. 'The party's determination . . . of the structure which best allows it to pursue its political goals is protected by the Constitution.' " [Citations omitted.]"

Id. at p. 827, emphasis added. The Court concluded, *"[I]t is the right of the party, not the state, to decide how the party shall be governed." Id.,* emphasis added.

The Court next turned its attention to the state's claim the statutes could be justified as potential vehicles for "sheltering parties from factional strife" and avoiding divisive "internal battles for control of the governing bodies." *Id.* at p. 829. After observing the state's argument ignored the distinction drawn in *Tashjian* between party disruption from within and party disruption from without, the Court dismissed the proffered rationale as reflecting a "paternalistic assumption that, left to their

own devices, parties will act in a manner adverse to their own interests":

> "We have no trouble concluding that *the First Amendment forecloses paternalistic state action designed to protect parties from choosing rules of governance that may prove to be harmful to party interests.* Freedom to choose includes the right to choose unwisely."

Id. at p. 830, emphasis added. The decision was affirmed in *March Fong Eu v. San Francisco County Democratic Central Committee, supra,* 489 U.S. 214.

B. Plaintiffs' Section 1983 Claim Cannot Be Based on Deprivation of the Right to Vote

Neither the complaint nor the amended complaint alleges that anyone involved in this case was deprived of the right to vote. It is not claimed that any individual or group was denied access to the polls, that anyone's vote was not counted, or that the elections were otherwise conducted improperly. Indeed, plaintiffs assert they were duly elected in properly conducted proceedings. The essence of their grievance is the Committee's subsequent decision to oust them for conduct deemed injurious to the Committee. Whether the injury perceived by the Committee consisted of plaintiffs' departures from an official party line, criticism of defendants in public, support for Democratic candidates, derogation of Republican candidates, or plaintiffs' status as homosexuals is irrelevant. The ouster was post-election conduct, not interference with an election.

Furthermore, the district court correctly observed that the fundamental right to vote is implicated in public elections, not party elections. Plaintiffs suggest *Terry v. Adams*, 345 U.S. 461, 97 L.Ed. 1152 (1953) compels a contrary conclusion. It does not. In that case, the Supreme Court held that a private party caucus could not deny African Americans the opportunity to vote in a party primary on account of race, when the all-white political club so controlled the party that those excluded from voting were effectively "disenfranchised." Here, no registered Republican was denied the right to vote at all, much less for discriminatory reasons. Furthermore, no case had expanded the rationale of *Terry* to a section 1983 claim outside the context of race discrimination. See, e.g., *Eu I*, 826 F.2d at p. 826, fn 21. *Morse v. Republican Party of Virginia*, 517 U.S. ___, 134 L.Ed.2d 347 (1996), relied on by plaintiffs, does not alter that conclusion. The case merely holds that a political party's imposition of a fee as a condition for participating in a nominating convention for United States senator is subject to the Voting Rights Act of 1965.

Nor can the construction plaintiffs seek to place on the "fundamental right to vote" withstand scrutiny under the line of Supreme Court decisions culminating in *Eu II*. By definition, an elected party officer is one who receives at least some votes in the party primary. In a sense, subsequent ouster necessarily "nullifies" the votes cast in his favor *whatever* the reason for ouster may be. If "disenfranchisement" alone were enough to give rise to an inference of unconstitutional conduct, the Party could never remove a committee member from its management, however damaging his or her conduct might be to the

group's political success. Perhaps this is why plaintiffs make the blanket assertion that once elected, a member cannot be removed from the Committee until the next election. AOB 16. However, the gist of their claim is not removal per se, but the supposedly unlawful purpose motivating the action. In other words, they asked the court to substitute its judgment for that of the Party. Had the district court complied, it would have contravened *Eu*. The right of the Party to govern its internal affairs would be meaningless if the state, through the judicial branch, were given veto power over the Committee's internal methods of eradicating injurious conduct, however unwise or misguided those methods might be.

Plaintiffs cite *Rosario v. Rockefeller* and *Storer v. Brown* for the proposition state interference with a party's internal affairs is justified. AOB 22. As noted above, the Supreme Court held in *Tashjian* that neither case can be invoked to prevent destruction of the Party *from within*. *Tashjian, supra*, 479 U.S. at pp. 223-224, 93 L.Ed.2d at p. 529. That is precisely what this lawsuit seeks to do.

Finally, plaintiffs overlook the fact that the voters in the primary at issue select a *Committee*, not an individual, to govern Party affairs at the county level. The vote for any member necessarily contemplated he or she would function with the managerial body, and in the event of conflict, the majority would rule. If the "electorate" is dissatisfied with the majority, it can replace them in a subsequent election. But the voters cannot legitimately be deemed "disenfranchised" when the *Committee* to which they have delegated the authority to make decisions in the best interests of the Party exercises that authority.

C. No Support for Plaintiffs' Position Is Found in *Romer v. Evans*

In *Romer v. Evans*, 517 U.S. ___, 134 L.Ed.2d 855 (1996), the United States Supreme Court struck down "Amendment 2," a Colorado initiative prohibiting all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals. 134 L.Ed.2d at p. 861. Plaintiffs falsely *quote* the case as holding the amendment was unconstitutional because it "infringed the fundamental right of gays and lesbians to participate in the political process." AOB 35. What the decision *actually* states is that prior to certiorari, the *Colorado* Supreme Court held Amendment 2 was subject to strict scrutiny since it infringed the fundamental right of gays and lesbians to participate in the political process. *Id.* at p. 861. Far from confirming that premise, the high Court stated "we granted certiorari and now affirm the judgment, *but on a rationale different from that adopted by the State Supreme Court.*" *Id.* at p. 862, emphasis added.

The Court concluded the amendment failed the rational basis test by imposing a broad and undifferentiated disability on a single group (homosexuals), then denying them access to any avenue with which to seek aid from the government. *Id.* at pp. 865, 867. While the Court did not expressly disavow a constitutional right to equal participation in the political process, it implied as much by applying the rational basis test to the Colorado amendment, "a law [which] neither burdens a fundamental right nor targets a suspect class." *Id.* at p. 865. Clearly, *Romer* holds the opposite of what plaintiffs claim it holds.

Nor is *Romer v. Evans* on point in terms of the constitutional right it did address. Plaintiffs' access to the legislative, executive and judicial branches of government remains unrestricted. They are free to vote, lobby, petition, sue, run for public office, join or remain in the political party of their choice, and avail themselves of the same legal rights and protections as other citizens. What neither they nor anyone else can do is control, by judicial mandate, the internal management of this or any other political party. Not one word of the complaint or the opening brief reveals facts to suggest plaintiffs have been denied the right to petition the government for redress of their grievances. *Nothing* in *Romer* is even relevant to, must less supportive of, plaintiffs' contrary assertion.

D. The Complaint Pleads No Facts to Support a Claim of Deprivation of Free Speech or Association

The original complaint alleged plaintiffs' ouster from the Committee was motivated by a desire "to squelch any difference of opinion or dissent, however raised, from a supposed 'official party line.' " It was also alleged defendants deprived plaintiffs of their civil rights of freedom of expression and association. As the district court ruled, these allegations were simply too vague to provide a basis for analysis of a First Amendment claim. Apart from reiterating the original allegations, the amended pleading merely concluded plaintiffs' ouster had the effect of "stifling political debate in and electoral input to defendant Central Committee." It is not difficult to discern the rationale underlying the district court's conclusion that a plain, clear and simple statement of the cause

of action as required by Rule 8(a) of the Federal Rules of Civil Procedure had not been provided.

The opening brief sheds no additional light on the specific nature of the supposed "free speech" claim before this Court. Only the following statement is provided: "It does not stretch to suggest that requiring Wadsworth to trade his individual dignity as expressed in his sexual orientation for the right to exercise his rights of free speech and political involvement asks, both in constitutional and in personal terms, simply too much." AOB 38. Simply recharacterizing as "speech" that which is allegedly a claim of discrimination on the basis of sexual orientation does not give rise to a First Amendment claim. *Dahl v. Secretary of U. S. Navy,* 840 F.Supp. 1319, 1324-1325 (E. D. Cal. 1993).

To the extent it might be inferred from the complaint that the speech at issue in this case consists of Johnson's and Wadsworth's proclamations concerning the "gay rights movement," the complaint is still defective. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. ___, 132 L.Ed.2d 487 (1995), the Supreme Court ruled unconstitutional application of a public accommodation law to require inclusion of a "gay rights" message in the public expressions of a private organization. *Hurley* addressed the Boston St. Patrick's Day Parade. The event, which dates back to 1947, was organized by an unincorporated association of private individuals pursuant to a grant of authority by the City of Boston. In the early 1990s, a group of gay, lesbian and bisexual descendants of Irish immigrants organized for the purpose of marching in the parade. The sponsor of the event twice denied their application. The gay rights

organization ("GLIB") filed suit alleging restricted access to the parade solely on the basis of sexual orientation violated the State public accommodations law. The judgment in favor of GLIB was appealed to the Supreme Judicial Court of Massachusetts, which affirmed. The United States Supreme Court granted certiorari, and in a *unanimous* opinion, *reversed*.

Hurley's directives clearly reveal that Johnson and Wadsworth cannot, under the guise of a "First Amendment" claim, sue to enforce their right to assert a "gay rights" message because to do so would dictate the speech of the Committee:

> "Petitioners' claim . . . to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for more considered judgment then it actively made, *the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.* The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian or bisexual, and the presence of the organized marchers would suggest

> their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. *But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."*

132 L.Ed.2d at p. 504, emphasis added.

It makes no difference that widespread transmission of Johnson's and Wadsworth's message might heighten social awareness. As the Court explained in *Hurley:*

> "It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but *a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes,* obviating any future need for correction. *But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.* Having availed itself of the public thoroughfares 'for purposes of assembly [and] communicating thoughts between citizens,' the Council is engaged in a use of the streets that has 'from ancient times, been a part of the privileges,

> immunities, rights and liberties of citizens.' [Citations.] Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. [Citations.] *The very idea that a non-commercial speech restriction be used to produce thoughts and statement acceptable to some groups or, indeed, all people, grates on the First amendment, for it amounts to nothing less than a proposal to limit speech to the service of orthodox expression.* The Speech Clause has no more certain antithesis. [Citations.] *While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one,* however enlightened either purpose may strike the government."

Id. at p. 507, emphasis added.

Johnson's and Wadsworth's brief to this Court, like their briefs to the district court, presents a vitriolic attack on what they *claim* is the Committee's viewpoint concerning homosexuals. They may derogate the *alleged* viewpoint all they want, urge political parties to draft platforms condemning discrimination, lobby in support of gays in the military, and take any other "stands" they choose. Their right to do so derives from the First Amendment and it has not been curtailed by the Committee. But the relief plaintiffs really seek through this litigation is judicial disapproval of what they *claim* is the viewpoint of a majority of the Committee for the purpose of forcing a contrary ideology. This they cannot do. As the Supreme Court stated in *Hurley*, "[d]isapproval of a

private speaker's statement does not legitimatize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at p. 508.

E. The Complaint Does Not Allege Unconstitutional Conduct Against a Protected Class

Plaintiffs claim *Romer* reflects the Supreme Court's pronouncement that discrimination against homosexuals is tantamount to discrimination on the basis of race. AOB 35. That characterization is the product of wishful thinking. As noted above, the Court applied a rational basis standard of review. The refusal of this Court and the Supreme Court to afford homosexuals deferential treatment on the basis of a "suspect" or "quasi-suspect" designation is reflected in prior decisions as well. *Bowers v. Hardwick*, 478 U.S. 186, 191-196, 92 L.Ed.2d 140, 146-149 (1986); *DeSantis v. Pacific Tel. & Tel. Co., Inc.* 608 F.2d 327, 333 (9th Cir. 1979). See also *Woodward v. U.S.*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); *National Gay Task force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), affd. *Board of Education of City of Oklahoma v. National Gay Task Force*, 470 U.S. 903, 84 L.Ed.2d 776 (1985).

Furthermore, in the context of this case it is not even necessary to reach the issue of plaintiffs' status as homosexuals since under *Hurley*, the pertinent inquiry is not the status of the speaker, but the context in which he demands to be heard. Just as the sponsors of the St.

Patrick's Day Parade were entitled to exclude GLIB irrespective of the merit of its message or its status as a supposed victim of societal discrimination, so the Committee is entitled to define its message and its standard bearers without interference from the state. *Eu I.*

For the same reason, plaintiffs' reliance on *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, (1979) 24 Cal.3d 458 is misplaced. AOB 36. However sympathetic and sensitive that opinion may be to "the struggle of the homosexual community for equal rights," it is not relevant here. Plaintiffs have conveniently omitted from the quoted excerpts of the decision any reference to the context in which the litigation arose, namely discrimination in employment. Indeed, such conduct is proscribed under California law. 24 Cal.3d at pp. 488-489. However, there is a significant difference between discriminatory conduct in the workplace and allegedly discriminatory ideology within private associations formed for the purpose of shared beliefs. The distinction is reflected in the California Supreme Court's recent decision in *Warfield v. Peninsula Golf & Country Club*, 10 Cal.4th 594 (1995), in which it was held the exclusion of women from a social club violated California's public accommodation law. The court took pains to clarify that if freedom of expressive association had been at issue in the case, the result would be different:

> "Because the application of [Civil Code] section 51 to defendant country club will have no appreciable effect on the club members' freedom of expressive association, the United States Supreme Court's very recent decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of*

> *Boston* [citations] holding that, under the First Amendment, a state public accommodation law may not be applied to require 'private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey' – provides no support for the club's constitutional claim in the present case."

Id. at p. 629.

Conversely, the California appellate court in *Hart v. Cult Awareness Network*, 13 Cal.App.4th 777 (1993), rev. den. recognized the public accommodations law could *not* be invoked to compel non-discriminatory conduct by a private association organized for *expressive* purposes, given the recognized right of political parties "to protect themselves from intrusion by those with adverse political principles" as recognized in *Democratic Party of the United States v. Wisconsin, supra. Id.* at p. 790. Plaintiffs' failure to acknowledge, much less appreciate, the Committee's freedom of expressive association infects their entire equal protection analysis.

CONCLUSION

While paying lip service to the directives of the United States Constitution, plaintiffs seek to achieve through judicial fiat that which the Supreme Court has refused to allow time and time again. They defy the requirements of "state action" pleading, ignore controlling precedent, and urge recognition of alleged deprivations which are illusory. Wadsworth is free to remain a member of the Republican party and attempt to effect change from within. He is also free to join his co-plaintiff

Johnson as a member of the Democratic Party. Both plaintiffs are free to establish their own party. What they cannot do, without trampling defendants' constitutional freedoms, is dictate the Party's message or preempt its decision to eradicate internal factionalism. Nor can they call upon the State to examine the Committee's motives or second-guess its conclusion that plaintiffs ouster was truly in the best interests of the Party. If the contrary were true, we would no longer have a democratic form of government.

For the reasons and pursuant to the authorities set forth hereinabove, appellees respectfully request that this Court affirm the judgment of the district court.

Dated: October 18, 1996

BOLLING, WALTER &
GAWTHROP

By: /s/ Marjorie E. Manning
MARJORIE E. MANNING
Attorneys for
Defendants/Appellees

STATEMENT OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify the foregoing brief is proportionately spaced, with the type face, point size and word count and that the brief does not exceed 40 pages or 14,000 words.

Dated: October 18, 1996

/s/ Marjorie E. Manning
Marjorie E. Manning

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2, defendants/appellees represent they are unaware of any case related to this appeal which is presently pending before this or any other federal court. Following judgment of dismissal in the district court, plaintiffs filed a new complaint in El Dorado County Superior Court advancing their purported state law claims, most of which are identical to the claims advanced in this appeal. The El Dorado County Superior Court action is now stayed pending resolution of this appeal.

Dated: October 18, 1996

/s/ Marjorie E. Manning
Marjorie E. Manning

(3)

No. 97-503

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

Petitioners,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS & DOES 1-25

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

Counsel of Record:
G. MICHAEL GERMAN
22 Second Street - Suite 310
San Francisco, CA 94105-3406
(415) 536-1838

Attorney for Petitioners

37pp

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PETITIONERS' REPLY BRIEF

I. Petitioners Have Not Waived Their 42 USC §§1985(3) and 1986 Claims

Respondents correctly note that "Petitioners' opening brief to the Ninth Circuit was devoid of *any* challenge to the District Court's dismissal of their Section 1985 and 1986 claims." Respondents' Opposition Brief (ROB), at 13-14. However, that does not mean Petitioners waived those claims or that they may not be reviewed by this Court.

The Ninth Circuit rule that a plaintiff waives all claims pled in an original complaint when they are not repled in an amended complaint, *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), "only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow summary judgment." *USS-Posco Industries v. Contra Costa County Bldg. & Const.*, 31 F.3d 800, 812 (9th Cir. 1994). The District Court dismissed Plaintiffs' §1985(3) and 1986 claims without leave to amend, the equivalent of a summary judgment dismissal. Respondents' Appendix (RA) at 40. Review of those claims has not been waived.

Commencing with the April 18, 1996, filing of their Civil Appeals Docketing Statement (CADS) required by Ninth Circuit Rule 3-4, Petitioners put both the Ninth Circuit and Respondents on notice that they were preserving the question of "Whether or not gays are a protected class for purposes of [their] 42 USC §1985 claims." Petitioners' Notice of Appeal, filed that same day, specifically listed "the judgment of the district court, entered in this case on March 20, 1996, *and all previously entered interlocutory orders and decisions of the court,*" as the items appealed.

Further, Petitioners' CADS advised both the Ninth Circuit and Respondents that Petitioners anticipated a motion to file an *amicus'* brief supporting Petitioners' appeal. Ninth Circuit Advisory Committee Note to Ninth Circuit Rule 29-1 prohibits repeating arguments made by the parties in *amicus* briefs. Petitioners and their supporting *amicus* thus efficiently - and properly - divided the work of addressing the issues on appeal between them under the governing Ninth Circuit rules.

Amicus' analysis of the 42 USC §§1985(3) and 1986 issues in its brief preserves them for review, *Teague v. Lane*, 489 U.S. 288, 300 (1989) and *Davis v. U.S.*, 114 S.Ct. 2350, 2354, fn * (1994), even if the Ninth Circuit, for whatever unexplained reason, denied the motion to file the sole *amicus* brief in this case. The Panel was timely presented with both a motion for leave to file an *amicus curiae* brief and the brief itself. Arguments in Petitioners' briefs were not repeated in *amicus'* brief or *vice-versa*. Yet, the Panel disallowed the filing of this sole *amicus* brief and ignored its arguments. AX A-2, fn 1.[1]

While receipt of *amicus curiae* briefs is discretionary, they assist in "insuring a complete and plenary presentation of difficult issues so the court may reach a proper decision." *Gotti v. U.S.*, 755 F.Supp. 1157, 1158 (ED, NY: 1991), (disallowing tardy and duplicative *amicus* brief). In declining the proffered *amicus* brief, the Panel abused its discretion and left unresolved recurring issues of national importance that should be reviewed on certiorari.

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[1]The rejected *amicus* brief is appended hereto as AX F.

Finally, Respondents cannot claim to have been misled in this regard since their briefs in both the Ninth Circuit and District Court fully explored the issues. *Greyhound Corp. v. Blakley*, 262 F.2d 401, 407-08 (9th Cir. 1958). Respondents' raising the issues in their briefs to the Ninth Circuit also gives this Court discretion to review the issues, even if Petitioners and *amicus* had not done so in theirs.[2] *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). This Court may also "consider it prudent and in the interest of justice to reach the issue at this time." *U.S. v. Holzman*, 871 F.2d 1496, 1512 (9th Cir. 1989). No other case now pending before this Court presents a more compelling reason to do so.

II. Denying The Fundamental Right To Vote Cannot Be Justified Under the Guise of "Party Management"

Respondents admit that the "right of political parties to govern their internal affairs without state interference involves an issue of significant national importance." ROB at 17. However, they err in stating that "it was resolved long ago" in connection with the facts of this Petition, for the instant matter is not a national convention delegate selection dispute, as were *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107 (1981), but is a test of the democratic process at its most elementary level.

Respondents thus sweep too broadly when they argue Petitioners advocate a "constitutionally flawed" "construction of the state action requirement which equates internal management of political parties with the official action of

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[2]Petitioners also addressed these issues in their Reply and En Banc Rehearing briefs filed in the Ninth Circuit.

government." ROB at 18. Petitioners seek neither to "rewrite the bylaws of the Republican Party" nor to "pass judgment" on the central committee's platform; what they seek is to retain their elected memberships on it without prejudice from their sexuality. Petitioners do not argue that central committees are state actors for all purposes; they do assert that in the limited context of admitting and expelling their popularly elected membership, central committees should be considered state actors subject to federal constitutional constraints.

Respondents quoted *Cousins*' holding that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Id.*, at 488. Respondents thus balance the rights of party members against those of the party itself and claim that even in the context of this Petition the rights of the committee outweigh those of its members. Since the committee is formed by individuals elected in a local primary, its collective rights, however denominated, cannot outweigh those of the people who voted it into existence. But for that election, Respondents would have no association on which to make their own derivative claim to associational rights.[3]

Nor is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which involved a state's futile attempt to limit a party's opening its ranks to non-members, controlling here. The decision made by Connecticut Republicans to *broaden* their base was a forthright exercise of political skill which in no way deprived anyone of a vote or *restricted* party membership, itself a constitutional right. *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973); *accord, Republican*

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[3]*Cf., Anderson v. Celebrezze*, 460 U.S. 781, 787-88 and fn 8, (1983), discussing *voters'* freedom of association.

Party of Arkansas v. Faulkner, 49 F.3d 1289, 1294 (8th Cir. 1995). Nor was "raiding" involved there or here, as it was in *Rosario v. Rockefeller*, 419 U.S. 752 (1973) and *Storer v. Brown*, 415 U.S. 724 (1974), which were cited in Petitioners' opening brief to the Ninth Circuit to demonstrate that a state has "a compelling interest in preserving the integrity of its election process," *Rosario, supra,* at 761, and that it "may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer, supra,* at 730.

To the extent that Respondents have any associational rights, this Court's decision in *Morse v. Republican Party of Virginia,* 116 S.Ct. 1186 (1996), makes it clear they have no application even where asserted beyond opposition to party membership along racial lines. *Id.*, at 1210. Indeed, *Morse* quoted from *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989), to justify intervention where "necessary to prevent the derogation of civil rights of party adherents," *Eu, supra,* at 232, quoted in *Morse, supra*, which certainly describes the individual and class plaintiffs in this action.[4]

In electing Johnson and Wadsworth to the committee, the voters did not agree to forfeit their fundamental right to choose who would best set local party policy in exchange for committee resolution of membership disputes under arbitrary, capricious and unconstitutionally vague standards like those used to oust Johnson and Wadsworth. Califor-

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[4]*Accord, Rockefeller v. Powers*, 74 F.3d 1367, 1375, fn 12 (2nd Cir. 1995): "none of the cases cited by the defendants stands for the proposition that state action that implicates a political party somehow becomes immune from judicial review because of a party's First Amendment associational rights."

nia's Elections Code already provided for resolving such disputes, as much as it provided for determining membership on central committees, and sexual orientation appears neither as a qualifier or disqualifier for committee membership. Clearly, Petitioners' allegations that they were removed because of their sexual orientation pled valid claims for federal constitutional relief.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338 (1995), is completely distinguishable from this Petition and does not direct its disposition. *Hurley* involved not the polls but a parade; a St. Patrick's Day one at that, traditionally and as a matter of record a time of greater mirth than might be expected on election day. *Id.*, at 2341. Moreover, it involved not §1983's state action requirement, but whether or not the admittedly private organization sponsoring the parade had violated Massachusetts' public accommodations law. *Id.*, at 2344. The most distinguishing factor, however, is found when comparing winning election to a central committee in a primary to applying or "simply showing up" to march in a parade. *Id.*, at 2342. As Respondents argued below, "the choice of a speaker not to propound a particular point of view" begs the question of who is the speaker. In *Hurley,* it was the parade organizers; here, it is the voters who spoke at the polls, not the committee or its members who silenced them by ousting Johnson and Wadsworth.

This Court has refused to find that state non-discrimination or public accommodation laws infringe a private organization's associative rights where those laws do not significantly alter the organization's ability to carry out its purpose or propagate its message. *New York State Club Ass'n. v. City of New York,* 487 U.S. 1, 13 (1989); *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte,* 481

U.S. 537, 548 (1987); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). Respondents have not shown that keeping Johnson and Wadsworth on the committee or not discriminating against them on the basis of their sexual orientation would in any way impair their ability to carry out their purposes or communicate with the voters, let alone that either Petitioner sought to impose a "gay agenda" upon the committee. Indeed, the pleadings establish that the committee itself failed to communicate its message to its electorate by refusing to publicize its meetings in advance, as it had determined to do. AX E, at ¶27. Respondents cannot demonstrate that they would be obliged to "'abandon or alter' any activities that are protected by the First Amendment." *New York State Club Ass'n., supra.* They only thing Defendants abandoned or altered was the voters' choice of Johnson and Wadsworth as their elected representatives on the committee.

As this Court wisely held in striking down racist child custody restrictions in *Palmore v. Sidoti*, 466 U.S. 29 (1984):

> "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. *Id.,* at 433.

This Court should not give effect to Respondents' private biases, as expressed in their twice ejecting Johnson and Wadsworth from their twice elected seats on the central committee, by allowing those ousters to stand without constitutional challenge.

III. Certiorari Should Be Granted To Reaffirm *Romer v. Evans* And To Find Homosexuals A Protected Class For Petitioners' 42 USC §§1985(3) & 1986 Claims

As noted in the instant Petition, at 29, fn 12, this Court, more than a year ago, remanded to the Sixth Circuit Court of Appeals its decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), for reconsideration in light of *Romer v. Evans*, 116 S.Ct. 1620 (1996). On October 23, 1997, the Sixth Circuit finally issued its opinion, which is cited electronically at 1997 FED App.0318P (6th Cir.) (herein, *Equality II*).

The Sixth Circuit's opinion flies in the face of *Romer* and reason. After reciting, at fn 2, a list of cases disallowing protected class status to homosexuals, most relying upon this Court's earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which specifically avoided equal protection analysis of criminal sodomy laws, the opinion on remand effectively reduced its inquiry to the absurdity of distinguishing Cincinnati's local ordinance, prohibiting what were seen as "special privileges" for homosexuals, from Colorado's statewide constitutional amendment, withdrawing the same basic citizens' rights from gays and lesbians. In reaffirming its prior opinion, the Sixth Circuit concluded that the Cincinnati law "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians." *Equality II, supra.*

The real danger in *Equality II*, apart from its ignoring *stare decisis* and the remand order from this Court, is its notion that the end justifies the means; if there was ever a result in search of a rationale, *Equality II* is it. Moreover,

the Sixth Circuit has ignored the clear trend of legal evolution post-*Romer*. As properly recognized by its sister circuit in *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996), "Of course, *Bowers* will soon be eclipsed in the area of equal protection by ... *Romer v. Evans*."[5]

Equality II may evidence another, less just, trend that this Court should stop in its tracks by granting certiorari: exploiting the unprotected class status of homosexuals by legislating against them with impunity. *Romer* properly cut short one such attempt; *Equality II* and this case show that there will be more efforts to deny homosexuals the equal protection of the laws and the equal opportunity to participate in the political life of our nation. The one sure way to prevent further abuses of their political rights is to at last recognize that gays and lesbians are indeed a suspect class and that they have a fundamental right to participate in the political process without prejudice to their sexuality.

Together, the Ninth Circuit's opinion in the instant Petition and the Sixth Circuit's opinion in *Equality II* would consign homosexuals to political exile and forever preclude them from repatriating themselves, whether by working through their chosen political party or through their local government. Whether heard separately or together, both decisions should be reviewed on certiorari to ensure that *all* citizens may exercise their fundamental political rights and protect those rights under the federal civil rights laws whenever and at whatever level they are threatened.

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[5]Note also *Nabozny's* recognition that "homosexuals are an identifiable minority, subject to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, that proposition was as self-evident in 1988 as it is today." *Id.*, at 457.

Respectfully submitted

G. MICHAEL GERMAN
Counsel of Record
22 Second Street - Suite 310
San Francisco, CA 94105-3406
(415) 536-1838
Attorney for Petitioners

AX F-1

NO. 96-15852

[Lodged AUG 19 1996]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL D. JOHNSON and KEVIN WADSWORTH,
Plaintiffs-Appellants,

v.

DAVID KNOWLES, REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY, et al.

Defendants/Appellees

Appeal from the United States District Court
for the Eastern District of California
[Case No. Docket No. CIV-S-95-835 MLS PAN]

The Honorable Milton L. Schwartz
United States District Judge

BRIEF OF AMICUS CURIAE
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM
[in support of Plaintiffs/Appellants]

EUGENE N. STUART III, ESQ. (Bar #122531)
685 Market Street, Suite 360
San Francisco, California 94105
(415) 512-0307
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM

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STATEMENT OF RELATED CASE

Amicus Curiae, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM ("BALIF") is not aware of any case pending or previously filed in this Court that is related to the above-entitled matter.

STATEMENT OF INTEREST

BALIF is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large. As part of that mission, BALIF actively participates in public policy debates concerning the rights of lesbians, gay men and bisexuals.

BALIF frequently appears as amicus curiae in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance. BALIF believes this to be such a case. The rights, and indeed the responsibilities, of gay men, lesbians and bisexuals to be involved in all levels of the political process can only be realized if there is *access* to all levels of that process. This case involves this seminal issue.

As appellants have elaborated on the facts in great detail, this brief alludes only to the facts related to the issues discussed herein.

ARGUMENT

I. STANDARD OF REVIEW

BALIF notes at the outset that the Court was ruling upon a FRCP Rule 12(b) motion to dismiss, which is reviewed *de novo* in this Court. This Court has held that a dismissal under FRCP 12(b)(6) is only proper **in extraordinary cases**. United States v. Redwood City, 640 F2d 963, 966 (1981) [emphasis added]. Generally, the motion to dismiss for failure to state a claim is **viewed with disfavor** and is rarely granted. Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F2d 1045, 1050 (1982) [emphasis added].

The district court, when ruling on the motion, must construe the complaint in the light **most favorable to the plaintiff**. Russell v. Landrieu, 621 F2d 1037, 1039 (1980) [emphasis added]. "A complaint cannot be dismissed for failure to state a claim **unless it appears beyond doubt** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 US 41, 45-46 (1957) [emphasis added]. The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. NL Industries, Inc. v. Kaplan, 792 F2d, 896, 898 (1986).

It need not appear that plaintiff can obtain the **specific relief demanded** as long as the court can ascertain from the face of the complaint **that some relief can be granted**. Doe v. U.S. Dept. of Justice, 753 F2d 1092, 1104 (1985) [emphasis added].

I. THE ACTIONS OF THE REPUBLICAN CENTRAL COMMITTEE CONSTITUTE STATE ACTION UNDER THE CIRCUMSTANCES OF THIS CASE

The district court ruled that to state a claim under 42 USC § 1983, the plaintiffs must show that the defendants acted under color of state law. [Plaintiffs Excerpts, ER38, Transcript of Hearing before the Honorable Milton L. Schwartz, February 16, 1996 (the "Feb. Trnscpt"), p.3, lines 4-8]. The Court cited Dang Vang v. Vang Xiong X. Toyed, 944 F2d 476, 479 (9th Cir. 1991), noting that: "A person acts under color of state law when exercising or purporting to exercise power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." [Feb.Trnscpt., p.5, lines 15-20].

The Court made the following findings and ruling with reference to Assemblyman Knowles' membership on the Republican Central Committee of El Dorado County [in pertinent part]:

> The Court has examined all of the allegations of the first amended complaint regarding the conduct of Knowles and finds that plaintiffs have not cured the deficiencies of their original complaint. First, **plaintiffs read too much into the designation of Knowles as an ex officio member of the Committee and his power to appoint an alternate member of the Committee.** Knowles obtained his position as an ex officio member on the Committee not by virtue of his status as a member of the State Assembly, but by virtue of his status as a party nominee for this position. See Califor-

> nia Elections Code § 7404 (West 1996 Special Pamphlet). **He does not have to be an incumbent officeholder to retain his membership on the Committee.** . . .
>
> Second, the additional factual allegations contained in the first amended complaint that involve any connection to Knowles position as an Assembly member are that he permits the Committee to use his legislative office to conduct its meetings and that on the official time and expense of the California State Assembly **he directed or influenced** Laveta Stelzmiller and Becker (his former legislative aide) to vote against Wadsworth's draft platform and **to bring about Johnson's and Wadsworth's ouster**. These allegations, together with the fact that Knowles may appoint an alternate member of the Committee, are simply not enough to support plaintiffs' contention that Knowles was abusing his position as an Assembly member by engaging in the conduct complained of...

[Plaintiffs' Excerpts, ER38, Feb.Trnscpt., p.6, line 10-p.7, line 22]

As to the Committee itself, the Court held that pursuant to Jackson v. Metro. Edison Co., 419 US 347, 350 (1974), neither the Committee nor its members were public officers.

First: It should be noted that the Court was incorrect in holding that Knowles ex officio position was not dependent upon him being an elected official. Election

Code § 7404(b) provides that if the party's nominee received less votes for the particular office (in this case, the Assembly) than a write-in candidate, and the write-in candidate was elected, than the elected write-in candidate is the ex officio member of the committee, in place of the original nominee. In other words, the position is not a private position, but a position created for an "elected" member of the Republican Party. It is only open to the nominee when a non-Republican holds the particular elected office. Consequently, although Knowles obtained his position as a nominee[1], he could not keep his position if a Republican Assemblyperson from his district had been elected instead of Knowles himself. This "elected" assemblyperson would have the *ex officio* position in place of Knowles.

Second: Membership on the Central Committee should be considered a public office for purposes of determining whether the Committee is acting under color of state law. Although the California Supreme Court has held that Central Committee membership does not typically constitute a public office, the Court has held that there may be some purposes for which membership is a public office.

In Moore v. Panish, 32 C3d 535, 545; 186 CalRptr 475; 652 P2d 32 (1982), the question was whether former Election Code Section 6402, which prohibited dual candidacy for public offices, would bar a member of a Central Committee from simultaneously running for another public

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[1]It should also be noted that even the status of "nominee" is the result of a public vote. The nominee of the Party for the Assembly is the winner of a public primary in which said person was listed on a state ballot, in a primary conducted by the state, whose results were certified by the California Secretary of State.

office. The Supreme Court determined that it was permissible to hold both offices because the Committee membership was not a public office for purposes of Section 6402, however the holding included the following caveat:

> We are not unmindful that the federal courts have viewed certain racially discriminatory activities of political parties as state action which violated constitutional guarantees. Even in these cases, however, the courts have refused to characterize political parties as public organizations, but have focused instead **on the impact of party primaries and membership rules on the effective exercise of the right to vote**. . . . We hold that the prohibition of dual candidacy contained in section 6402, subdivision (b) does not apply to the selection of member to party county central committees, **but express no opinion of whether party offices might be considered public for some other purposes.**

[Moore, 32 C3d at 545, fn.10 (emphasis added)]

Third: The California Supreme Court has also held that the fact that the courts usually will not interfere with the affairs of political committees does not render such committees immune from all court action. In Malone v. Superior Court, 40 C2d 546; 254 P2d 517 (1953) the Court held as follows:

> The prospective witnesses contend, however, that courts will not interfere with the affairs of political parties or committees

> and hence applicant could have no cause of action. . . .*Where, however, statutes conferring legal rights on members of a political party have been passed*, **the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such a question is of no binding effect**. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization [of] rights derived from such election, the question being no longer solely a political one, but one of law of which the courts *must* take cognizance. **The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority**. . . . Certainly where **civil and property rights** rather than politics and political dogma are involved, the courts will protect them.

[Malone, 40 C2d at 551 (emphasis added; citations and interior quotes omitted)].

Appellants WADSWORTH and JOHNSON were "members of a party committee elected at a primary election conducted under public authority." Certainly one of their rights, as members of the committee, was the right not to be removed from the committee **in violation of statute**. Election Code § 7411 and Election Code § 7413 enumerate the grounds for the removal of an elected member of the committee.

Election Code § 7411 provides:

> Any member of a committee, **other than an ex officio member,** who misses four regularly called meetings within one 12-month period shall be removed from the committee concerned, unless his or her absence is caused by illness or temporary absence from the county on the date of the meeting.

Election Code § 7413 provides:

> A committee may remove any member, other than an ex officio member, who during his or her term of membership affiliates with, or registers as a member of another party, who publicly advocates that the voters should not vote for the nominee of this party for any office, or who gives support or avows a preference for a candidate of another party or candidate who is opposed to a candidate nominated by this party.

The complaint alleges that the Appellants were not removed from the Committee for any of the above reasons, but because they were homosexuals. The district court should have accepted this allegation as true since it was ruling on a Rule 12(b)(6) motion to dismiss.[2] Removal

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[2]The U.S. Supreme Court has held that the sole issue raised by a Rule 12(b)(6) motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, no matter how improbable the facts alleged are, **they must be accepted as true** for purposes of the motion. Neitzke v. Williams, 490 US 319, 109 S.Ct. 1827, 1833 (1989).

from elected office on the basis of sexual orientation is not included in the grounds for removals specified in either § 7411 or § 7413, and plaintiffs' right to keep their elected office, except for the grounds specified in §§ 7411 and 7413, is a protectible statutory interest amenable to court review pursuant to Malone.

It should also be noted that the grounds for removal delineated in Sections 7411 and 7413 are not applicable to *ex officio* committee members, such as Assemblyman Knowles. This further demonstrates that the *ex officio* position reserved for the elected state official is significantly different than the position held by a person elected as a committeeperson.

The allegations of the complaint are that KNOWLES, who holds his seat at this time **solely because he is the elected Republican Assemblyman from his district**, actively participated, and in fact instigated, the removal of plaintiffs from the Central Committee (in violation of plaintiffs' statutory and constitutional rights), in concert with other committee members. This satisfies the "joint action" test as enunciated by the Court [Plaintiffs Excerpts, ER27, p.9] pursuant to Collins v. Womancare, 878 F2d 1145, 1148 (1989), for determining whether actions have occurred under color of state law vis-a-vis violations of 42 USC § 1983.

[However, even if it were appropriate for the District Court to treat this matter as a summary judgment motion, it would still have to be denied, because the defendants' claim that plaintiffs were actually removed for renting their establishment to a democrat for a fundraiser, and not because they were homosexuals, clearly raises a question of fact. Plaintiffs claim they took no part in the fundraiser, and did not endorse the candidate, but held there premises out for rent to members of the public, and this was just a business transaction.]

II. HOMOSEXUALS ARE A CLASS ENTITLED TO PROTECTION UNDER 42 USC 1985(3)

Plaintiffs' claim for relief under 42 USC § 1985(3) were dismissed by the Court without leave to amend [Plaintiffs' Excerpts, ER26, p.26, lines 22-24]. The District Court held that:

> To state a claim under Section 1985(3) a plaintiff must allege: (1) a conspiracy; (2) to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; (3) an act by one of the conspirators in furtherance of the conspiracy; and (4) personal injury, property damage or deprivation or any right or privilege of a citizen of the United States. . . .
>
> Homosexuals are not a, quote, "class," unquote, within the meaning of 1985(3) . . .
>
> [Plaintiffs' Excerpts, ER26, p.24, line 21-p.25, line 8]

The District Court cited DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F2d 327 (9th Cir. 1979) for the proposition that homosexuals were not an appropriate "class." The DeSantis Court held that while the forerunner of Section 1985(3) was originally intended "to provide special federal assistance to southern blacks and their allies in protecting their rights under the fourteenth amendment and other reconstruction legislation against the Ku Klux Klan and others" later Supreme Court jurisprudence held that § 1985(3) applied "only when there is 'some racial, or

perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" DeSantis, 608 F2d at 332.

The DeSantis plaintiffs had cited the Ninth Circuit's ruling in Life Insurance Co. of North America v. Reichardt, 591 F2d 499 (9th Cir. 1979) as extending the protection of § 1985(3) to women, and therefore extrapolated that it could be extended to homosexuals as well. The DeSantis court disagreed, holding that:

> . . . While § 1985(3) has been liberated from the now anachronistic historical circumstances of reconstruction America, we may not uproot § 1985(3) from the principle underlying its adoption: The Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights. This underlying principle must continue to determine the coverage of § 1985(3).
>
> . . . it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals a "suspect" or "quasi-suspect" classification so as to require more exacting scrutiny of classifications involving homosexuals.
>
> [DeSantis, 608 F2d at 333]

The "classification" language in DeSantis was based on the holding in Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 1202 (E.D.Va.1975), which upheld a consti-

tutional challenge to Virginia sodomy laws. This case was cited when a similar issue, involving Georgia sodomy laws, subsequently came before the U.S. Supreme Court in Bowers v. Hardwick, 478 US 186; 92 L.Ed.2d 140; 106 S.Ct. 2841 (1986). In Bowers, the Court held that the issue being decided was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" which would invalidate many State laws to the contrary [Bowers, 92 L.Ed.2d at 145].

In the instant case, the district court also cited High Tech. Gays v. Defense Industry Sec. Clearance Off., 895 F2d 563, 574 (9th Cir. 1990) as a basis for the proposition that homosexuals do not constitute a suspect class [Plaintiffs' Excerpts, ER26, p.22, lines 20-25]. However, the basis for the decision in High Tech. Gays was also Bowers (see High Tech. Gays, 895 F2d at 571).

At this juncture, it is important to note what Bowers *did not* decide. Bowers *did not* address the issue of whether homosexuals, as a class, were entitled to equal protection under the constitution. The Court specifically noted that the "Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." [Bowers, 92 L.Ed.2d at 149, fn.8]. This issue was left for another case.

That **other** case, which was recently decided, is Romer v. Evans, 517 US ___; 134 L.Ed.2d 855; 116 S.Ct.___ (1996). In Romer, the Supreme Court invalidated a Colorado amendment, Amendment 2, that repealed various statutes, regulations, ordinances and policies of state and local entities that barred discrimination based upon sexual orientation. Romer, 134 L.Ed.2d at 862. The Romer Court noted that:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.
>
> . . . We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.
>
> **Amendment 2 fails, indeed defies, even this conventional inquiry.** First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward **the class** that it affects; it lacks a rational to legitimate state interests.

[Romer, 134 L.Ed.2d 865-866 (emphasis added)]

The Court further held that:

> Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons

by a single trait and then denies them protection across the board. The resultant disqualification of **a class of persons** from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .[¶]Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. . . . Respect for this principle explains why laws singling out **a certain class of citizens** for disfavored legal status or general hardships is rare. A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. **The guaranty of equal protection of the laws is a pledge of the protection of equal laws.**

[Romer, 134 L.Ed.2d 866-867 (emphasis added)]

Romer has been cited at length for two reasons:

(1) to demonstrate that the Supreme Court has held that homosexuals may be considered a discrete class of individuals under the law (whether suspect or not); and

(2) to demonstrate that Bowers, and its progeny and predecessors, do not bar homosexuals, as a class, from entitlement to

equal protection of the laws.

This suggests that, in this case, the district court's reliance on both DeSantis and High Tech. Gays was misplaced. It should be noted that other courts have not construed 42 USC §1985(3) as protecting only racial or suspect classifications. As this Court noted in Reichardt (*supra*):

> Courts construing § 1985(3) have not limited its protection to racial or otherwise suspect classifications. Means v. Wilson, 522 F2d 833 (8th Cir. 1975)(political opponents are a sufficient class); Cameron v. Brock, 473 F2d 608 (6th Cir. 1973)(supporters of a political candidate are a sufficient class); Azar v. Conley, 456 F2d 1382 (6th Cir. 1972)(a single family is a sufficient class). Reichardt's allegation that an invidiously discriminatory animus was the motivating force behind the disparate policy terms offered to women is thus **sufficient to survive a motion to dismiss for failure to state a claim.**
>
> [Reichardt, 591 F2d at 505 (emphasis added)]

So, too, should the claims of the plaintiffs in this action, that their expulsion from their duly elected offices on the Central Committee was based upon their status as members of disfavored class, have been sufficient to survive a motion to dismiss for failure to state a claim. This is especially true in light of the fact that the plaintiffs' removal from office violated their right as elected members of the Committee to be removed for only those reasons

cited in Election Code §§ 7411 and 7413.

In the Means case (*supra*), the Eighth Circuit held: "It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 USC § 1985(3). . . . The Sixth Circuit has held, and we agree, that the right to cast a ballot in a state election is also protected from interference from private conspiracies by the federal Constitution." [Means, 522 F2d at 838]. The right to hold office, even a non-public office, as the result of such votes, should be similarly protected.

In Griffin v. Breckenridge, 403 US 88; 29 L.Ed.2d 338; 91 S.Ct. 1790 (1971), the Supreme Court held as follows with reference to the proper interpretation of 42 USC § 1985(3):

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, **must aim at a deprivation of the equal enjoyment of rights secured by the law to all**.
>
> [Griffin, 29 L.Ed.2d at 348]

The plaintiffs alleged that the defendants wanted to remove them from their elected post on the Central Committee because they were homosexuals. This motivation is clearly a "class-based" invidiously discriminatory animus.

The District Court's only justification for dismissing plaintiffs' § 1985(3) claim was its finding that homosexuals were not a proper class. There should be no doubt, following Romer, that homosexuals are an identifiable class entitled to equal protection. This Court should, therefore, reinstate plaintiffs' § 1985(3) claim.

CONCLUSION

Since Assemblyman Knowles *ex officio* position on the Central Committee can only be held by an elected Republican official when one holds that office, it is a sufficiently public office to satisfy § 1983's requirement of state action via the joint action exception. Homosexuals are a sufficiently identifiable class, at least on par with the political class identified in Means, to bar dismissal of a § 1985(3) claim on a Rule 12(b)(6) motion to dismiss. This Court should, therefore, reverse the ruling of the District Court on these two issues.

Respectfully submitted,
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/s/

Eugene N. Stuart III
FOR AMICUS CURIAE
BAY AREA LAWYERS FOR
INDIVIDUAL FREEDOM
685 Market Street, Suite 360
San Francisco, CA 94105
Telephone: (415) 512-0307